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IN THE

# Supreme Court of the United States

October Term, 1978.

No. 78-148

KAISER ALUMINUM & CHEMICAL CORP. and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
*Petitioners,*

*v.*

COLUMBIA METAL CULVERT CO., INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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# INDEX.


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 3 |
| Statutes Involved | 7 |
| Statement of the Case | 8 |
| 1. The Background | 8 |
| 2. The Proceedings Below | 10 |
| A. In the District Court | 10 |
| 1. The Amended Complaint | 10 |
| 2. The Trial | 11 |
| (i) The Issue of Intra-enterprise or "Bathtub" Conspiracy | 12 |
| (ii) Relevant Product Market | 13 |
| (iii) Monopoly Power | 15 |
| B. The Court of Appeals | 15 |
| 1. Intra-enterprise Conspiracy | 17 |
| 2. Relevant Product Market | 18 |
| 3. The "Price Squeeze" Theory | 19 |
| Reasons for Granting the Writ | 21 |
| I. The Court Should Grant Certiorari to Settle the Conflict Among the Circuits Concerning Applicability of the Sherman Act to Corporations and Their Wholly-Owned, Non-Competing Subsidiaries Under the So-Called "Intra-Enterprise Conspiracy Theory" | 21 |
| II. The Court Should Grant Certiorari to Clarify the Contours of the "Price Squeeze" Theory of Sherman Act Liability of Vertically Integrated Manufacturers | 29 |
| III. The Court Should Grant Certiorari to Clarify the Standard Adopted in *Brown Shoe v. United States* for Definition of Relevant Product Market in Antitrust Cases | 31 |

## INDEX (Continued).


Page

IV. The Court Should Grant Certiorari to Resolve Important Questions of Statutory Construction Under the Sherman Act Involved in the Nationwide Enforcement of the Antitrust Laws ..... 33

V. Conclusion ..... 34

APPENDIX A—Order of the Court of Appeals for the Third Circuit Granting Appellees' Motion for Stay of Mandate Pending Application for Writ of Certiorari ..... A1

APPENDIX B—Order of the Court of Appeals for the Third Circuit En Banc Denying Appellees' Petition for Rehearing ..... A2

APPENDIX C—Judgment of the Court of Appeals for the Third Circuit ..... A3

APPENDIX D—Opinion of the Court of Appeals for the Third Circuit ..... A5

APPENDIX E—Opinion of the United States District Court for the Eastern District of Pennsylvania Granting Petitioners' Motion Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for a Directed Verdict ..... A38

APPENDIX F—Judgment of the United States District Court for the Eastern District of Pennsylvania ..... A61


## TABLE OF AUTHORITIES.


**Cases:** Page

American Tobacco Co. v. United States, 328 U. S. 781 (1946) 29

Ark Dental Supply Co. v. Cavitron Corp., 461 F. 2d 1093 (3d Cir. 1972) ..... 27

Battle v. Liberty National Life Insurance Co., 493 F. 2d 39 (5th Cir. 1974), cert. denied, 419 U. S. 1110 .....26, 27

Beckman v. Walter Kidde & Company, 316 F. Supp. 1321 (E. D. N. Y. 1970), aff'd, 451 F. 2d 593 (2d Cir. 1971), cert. denied, 408 U. S. 922 (1972) ..... 26

Brown Shoe Co., Inc. v. United States, 370 U. S. 294 (1962) 6, 11, 16, 19, 31, 32

Call Carl, Inc. v. BP Oil Corporation, 403 F. Supp. 568 (D. Md. 1975), aff'd, 554 F. 2d 623 (4th Cir. 1977), cert. denied, 46 U. S. L. W. 3293 ..... 26

Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F. 2d 501 (3d Cir. 1976) .....26, 27

George Whitten, Jr. v. Paddock Pool Builders, Inc., 508 F. 2d 547 (1st Cir. 1974), cert. denied, 421 U. S. 1004 ..... 32

International Railways v. United Brands, Inc., 532 F. 2d 231 (2d Cir. 1976), cert. denied, 429 U. S. 835 (1976) ..... 25

Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824 (N. D. Ga. 1976) ..... 25

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd., 416 F. 2d 71 (1969), cert. denied, 396 U. S. 1062 ..24, 29

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U. S. 211 (1951) .....3, 21, 22, 26, 29

Knutson v. Daily Review, Inc., 548 F. 2d 795 (9th Cir. 1976), cert. denied, 433 U. S. 910 (1977) ..... 24

Minnesota Bearing Co. v. White Motor Corp., 470 F. 2d 1323 (8th Cir. 1973) ..... 26

Perma Life Mufflers v. International Parts Corp., 392 U. S. 134 (1968) .....3, 21, 23, 24

## TABLE OF AUTHORITIES (Continued).

**Cases (Continued):** Page


REA Express, Inc. v. Alabama Great Southern R. R., 427 F. Supp. 1157 (S. D. N. Y. 1976), aff'd, 550 F. 2d 1342 (1976) ..... 26, 27
Sunkist Growers v. Winckler & Smith Citrus Products Co., 370 U. S. 19 (1962) ..... 23, 28
Syracuse Broadcasting Corp. v. Newhouse, 319 F. 2d 683 (2d Cir. 1963) ..... 25, 26
Tamaron Distributing Corp. v. Weiner, 418 F. 2d 137 (7th Cir. 1969) ..... 26
T. V. Signal Company of Aberdeen v. American Telephone & Telegraph Co., 462 F. 2d 1256 (8th Cir. 1972) ..... 25
Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951) ..... 3
United States v. Aluminum Company of America, 148 F. 2d 416 (2d Cir. 1945) ..... 5, 29, 30, 31
United States v. Citizens & Southern National Bank, 422 U. S. 86 (1975) ..... 3, 21, 22
United States v. E. I. DuPont de Nemours & Co., 351 U. S. 377 (1956) ..... 31, 32
United States v. United States District Court, 334 U. S. 258 (1948) ..... 29
United States v. Yellow Cab Co., 332 U. S. 218 (1947) ..... 3, 21


**Statutory Provisions:**


Clayton Act, Section 3, 15 U. S. C. § 14 ..... 8, 11, 16, 30
Capper-Volstead Act ..... 23
Federal Rules of Civil Procedure 50(a) ..... 2, 8, 11
Robinson-Patman Act, Section 2(a), 15 U. S. C. § 13(a) ..... 8, 11
Sherman Act, 26 Stat. 209:
Section 1, 15 U. S. C. § 1 ..... passim
Section 2, 15 U. S. C. § 2 ..... passim
15 U. S. C. § 7 ..... 23
7 U. S. C. § 291 ..... 23
28 U. S. C. § 1254(1) ..... 2
28 U. S. C. § 2109 ..... 29


## TABLE OF AUTHORITIES (Continued).

**Miscellaneous Authorities:** Page


Handler, "Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review", 57 Cal. L. Rev. 182 (1969) ..... 27
Handler, "Twenty-Five Years of Antitrust", 73 Colum. L. Rev. 415 (1973) ..... 27
Willis and Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries", 43 N. Y. U. L. Rev. 20 (1968) ..... 27
Directory of Intercorporate Ownership (Who Owns Whom in America), ed. J. L. Angel (1974) ..... 33

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*Petitioners,*

*v.*

COLUMBIA METAL CULVERT CO., INC.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners, Kaiser Aluminum and Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc., pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on May 24, 1978.

## OPINIONS BELOW.

The United States District Court for the Eastern District of Pennsylvania granted petitioners' motion pursuant to Rule 50(a) of the Federal Rules of Civil Procedure for a directed verdict at the close of plaintiff's evidence on May 2, 1977. The Opinion of the Honorable Edward N. Cahn dated July 20, 1977, is unreported and is printed in Appendix E hereto, *infra*, pp. A38-60. The panel opinion of the Court of Appeals for the Third Circuit reversing in part and affirming in part the judgment entered in the United States District Court, filed May 24, 1978, has not yet been reported and is reprinted as Appendix D hereto, *infra*, pp. A5-37. The Court of Appeals for the Third Circuit denied a Petition for Rehearing and Suggestion of Rehearing En Banc, without opinion. The Order denying the Petition for Rehearing is printed as Appendix B hereto, *infra*, p. A2.

## JURISDICTION.

The Court of Appeals entered Judgment reversing in part and affirming in part the Judgment of the United States District Court on May 24, 1978. A timely petition for rehearing containing a suggestion for rehearing *en banc* was filed by Petitioners on June 7, 1978, and was denied by Order (Appendix B, p. A2) of the Court of Appeals *en banc* dated and entered June 21, 1978. On June 27, 1978, Petitioners filed a timely motion for stay of mandate pending application to this Court for a Writ of Certiorari, which the Court of Appeals granted by Order dated June 29, 1978 (Appendix A, p. A1), thereby staying its mandate until July 27, 1978.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).



## QUESTIONS PRESENTED.

Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, prohibit combinations and conspiracies in restraint of trade and conspiracies to monopolize trade and commerce. It is well-settled that a "conspiracy" within the meaning of the Sherman Act requires proof of a "plurality of actors." Whether a corporation and its subsidiaries or subsidiaries of a common parent corporation can "conspire" with each other (in so-called "bathtub conspiracies") within the meaning of the antitrust laws has been considered by the Court in *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951); *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134 (1968); and *United States v. Citizens & Southern National Bank*, 422 U. S. 86 (1975). While these decisions establish the general proposition that the mere fact of corporate affiliation confers no immunity from the antitrust laws, the Court has never settled the important core issue whether a corporation can be guilty of a "conspiracy" within the meaning of the Sherman Act with its wholly-owned, noncompeting sales subsidiary which together with the parent comprises a single economic enterprise. In these cases, and most recently again in *Citizens & Southern National Bank, supra*, the Court has intimated that the capacity of such a singular business unit to comprise a Sherman Act "conspiracy" may turn on whether it is held out to the public as two "distinct" or "competing" entities (422 U. S. at 116): "This Court has held that even commonly owned firms must compete against each other, *if they hold themselves out as distinct entities.*" (Emphasis added).

The questions presented in this case are these:

1. Did the Court of Appeals err in holding that a corporation and its 100%-owned sales subsidiary possess the capacity to "conspire" with each other within the meaning of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, where:

(i) the Board of Directors of the parent corporation is identical with the Board of Directors of the subsidiary;

(ii) 32 of the 34 officers of the subsidiary are officers of the parent;

(iii) parent and subsidiary share the same corporate offices;

(iv) parent and subsidiary do not hold themselves out to the public as competitors or as distinct entities; and

(v) the public does not distinguish between parent and subsidiary and the industry considers parent and subsidiary as a single economic entity?

2. Did the Court of Appeals err in concluding that evidence that a vertically integrated manufacturing corporation which on occasion transferred aluminum sheet and coil on the books of the company to its 100%-owned incorporated division at inventory values or "transfer prices" less than their estimated cost was evidence which would present a jury issue and support a competitor's claim that the parent and its 100%-owned, incorporated division had "conspired" to restrain trade and "conspired" to monopolize trade and commerce in the market of the finished aluminum culvert pipe fabricated by the division



from the sheet and coil transferred to it by its parent where:

(i) neither the parent nor its 100%-owned incorporated division was a supplier of aluminum sheet and coil to the competitor during the period in question;

(ii) the competitor expressly abandoned below any claim that the aluminum culvert pipe fabricated by the 100%-owned incorporated division was sold at predatorily low prices;

(iii) there was no evidence that the relevant product market for sheet and coil used in the manufacture of culvert pipe consisted of aluminum sheet and coil, alone; and

(iv) there was no evidence of market share in the relevant market of sheet and coil for use in fabricating culvert pipe, or that the parent possessed monopoly power in that market?

3. Did the Court of Appeals err in concluding that there was evidence sufficient to present an issue for the jury under the "price squeeze" doctrine of *United States v. Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945), that a vertically integrated manufacturer and its wholly-owned incorporated division had unlawfully "squeezed" a competing non-integrated fabricator of culvert pipe between raw material prices and finished pipe prices where:

(i) the competitor conceded that during the period of the alleged "price squeeze" it did not even purchase aluminum sheet or coil raw materials from the manufacturer or its wholly-owned incorporated division;

(ii) the competitor expressly abandoned below any claim that finished aluminum culvert pipe fabricated and sold by the wholly-owned incorporated division was sold at a predatorily low price?

4. Did the Court of Appeals err in finding that a wholly-owned subsidiary's selection with approval of its parent of a site for a new pipe manufacturing operation in the stipulated relevant geographic market served by a competitor's manufacturing facility was evidence of a "conspiracy" between parent and subsidiary to restrain and monopolize trade and commerce in culvert pipe which presented a jury issue under Sections 1 and 2 of the Sherman Act?

5. Did the Court of Appeals err in finding that proof that aluminum culvert pipe has certain physical properties which it does not share with culvert pipe made of steel and concrete—only one of the seven criteria to be considered under *Brown Shoe Co., Inc. v. United States,* 370 U. S. 294 (1962), in defining relevant product market under Sections 1 and 2 of the Sherman Act—was by itself sufficient to create a jury issue on the issue of relevant product market where, as the district court found, the plaintiff had introduced overwhelming, uncontradicted evidence under the other six *Brown Shoe* criteria that the relevant product was not aluminum culvert pipe, alone, but metal culvert pipe (aluminum or steel).



## STATUTES INVOLVED.

SHERMAN ACT, Act of July 2, 1890, c. 647, 26 Stat. 209, as amended:

Section 1 (15 U. S. C. § 1):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court."

Section 2 (15 U. S. C. § 2):

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

## STATEMENT OF THE CASE.

### 1. The Background.

This is a private antitrust case for treble damages and injunctive relief alleging violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2.[1]

Plaintiff, Columbia Metal Culvert Co., Inc. ("Columbia"), is a fabricator of aluminum culvert and drainage pipe, having its manufacturing facilities in Vineland, New Jersey. Defendant Kaiser Aluminum & Chemical Corporation ("KACC") is an integrated producer of aluminum and aluminum products. Defendant Kaiser Aluminum & Chemical Sales, Inc. ("KACSI") is a 100%-owned subsidiary of KACC which is engaged in the sale of the aluminum products manufactured by its parent, KACC. KACC and KACSI have the same board of directors, and 32 of the 34 officers of KACSI are officers of its parent, KACC. KACC and KACSI share the same corporate offices and do not hold themselves out to the public or in the industry as competitors or as distinct entities. They are known collectively in the industry (and are referred to collectively herein) as "Kaiser" and function as a single economic entity.

Culvert and drainage pipe is used for the purpose of moving water underground by gravity from one point to another and is manufactured from a variety of materials, including concrete, steel, aluminum, plastic, asbestos-cement and vitrified clay. Culvert and drainage pipe is

1. The original and amended complaints also contained claims under Section 3 of the Clayton Act, 15 U. S. C. § 14, and Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a). At the close of the plaintiff's proof at trial, the district court granted defendants' motion for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure with respect to all claims. The directed verdict was upheld by the Court of Appeals with respect to Section 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act. Consequently, this case presents no issues with respect to those provisions.



principally used in the construction and maintenance of highways and storm sewers. The principal customers for culvert and drainage pipe are federal, state, and local highway departments, municipalities and private developers.

Until the 1960's, culvert pipe was manufactured from clay (terra cotta), concrete, and steel. Aluminum was not introduced as a culvert material until the late 1950's. Industry sales are dominated by concrete pipe producers and large, vertically integrated steel producers such as United States Steel Corporation, Bethlehem Steel Corporation, Armco Steel Corporation and Republic Steel Corporation.

Kaiser pioneered the early development and introduction of aluminum as a culvert commodity designed specifically for the purpose of replacing steel and concrete culvert pipe and entered into competition with the integrated steel producers in sales of aluminum culvert coil and sheet to independent fabricators, which at that time used culvert pipe manufacturing equipment exclusively for the fabrication of steel pipe. Steel culvert pipe and aluminum culvert pipe are manufactured on the same machinery.

Columbia is the successor to Columbia Steel & Culvert Company, which prior to its financial reorganization in 1962 was engaged in the fabrication of steel culvert pipe, and is owned by the same interests which own and operate Kerr Concrete Pipe Company, a New Jersey producer of concrete culvert pipe.

Columbia and Kaiser (which sells directly and through an independent distributor) compete in the sale of culvert and drainage pipe made of aluminum in the Middle Atlantic Eastern Seaboard, consisting of New Jersey, Pennsylvania, New York, Delaware, Maryland, Southern New England, Northern Virginia and West Virginia. The

parties stipulated that this region was the relevant geographic market for purposes of this antitrust case.

**2. The Proceedings Below.**

**A. In the District Court.**

**1. The Amended Complaint.**

Columbia's amended complaint alleged an unlawful conspiracy between Kaiser and its local, independent distributor Kennedy Culvert & Supply Co., Inc. and its principal, Robert A. Kennedy (a former Columbia salesman), to drive Columbia out of business by predatory pricing and unfair competition.[2]

The amended complaint also charged that KACC and KACSI[3] were engaged in a "conspiracy" between themselves in violation of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, to restrain and to monopolize trade and commerce in a narrow product market alleged to consist of culvert and drainage pipe made of aluminum. The amended complaint also charged these defendants with monopolization and attempted monopolization of that

2. At the close of plaintiff's case, the district court granted a motion for directed verdict in favor of defendants Kennedy Culvert & Supply Co., Inc. and Robert A. Kennedy. That judgment was subsequently affirmed below by the Court of Appeals for the Third Circuit. No issue regarding this aspect of the judgment below is presented in the present petition. The only issues presented concern the applicability of Sections 1 and 2 of the Sherman Act to KACC and KACSI.

3. In the original complaint, plaintiff named as defendants Kaiser Aluminum & Chemical Corporation and *Kaiser Industries Corporation*. After discovery disclosed no basis for plaintiff's claim against Kaiser Industries Corporation, plaintiff, in an amended complaint, filed prior to trial, substituted Kaiser Aluminum & Chemical Sales, Inc. for Kaiser Industries Corporation as a defendant. (While the caption of the district court's formal judgment, App. F, p. A61 hereto, retains the original caption of the case, Kaiser Industries Corporation was dropped as a defendant in the amended complaint.)



trade and commerce, in violation of Section 2 of the Sherman Act, as well as violations of Section 3 of the Clayton Act, 15 U. S. C. § 14 and Section 2(a) of the Robinson-Patman Act, 15 U. S. C. § 13(a).

**2. The Trial.**

Plaintiff abandoned its claim under the Robinson-Patman Act before trial, and this case went to trial on the remaining claims before the Honorable Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania and a jury. At the conclusion of plaintiff's evidence, all defendants moved for a directed verdict pursuant to Rule 50(a) of the Federal Rules of Civil Procedure on all claims pleaded in the amended complaint. After briefing and oral argument, the district court granted a directed verdict in favor of defendants on all counts and entered judgment on the verdict in favor of defendants. The district court held, in its Memorandum Opinion dated July 20, 1977 (Appendix E, *infra* at pp. A38-60), that (1) there was no evidence of a conspiracy between Kaiser and its distributor, Kennedy and Kennedy Culvert & Supply Co., Inc.; (2) there was no evidence of a conspiracy between KACC and KACSI; (3) measured by the criteria laid down in *Brown Shoe Co., Inc. v. United States*, 370 U. S. 294 (1962), plaintiff's own evidence on the issue of relevant product market permitted but one conclusion: that the relevant product market consisted of metal culvert and drainage pipe (*i.e.* pipe made from steel and aluminum) at least, or culvert and drainage pipe made from concrete, steel and aluminum; (4) that neither KACC nor KACSI possessed a significant market share in excess of 10% in either of the relevant markets plaintiff had proven and as a matter of law lacked monopoly power with respect to those relevant product markets.

**(i) The Issue of Intra-enterprise or "Bath-tub" Conspiracy.**

While in view of the absence of evidence of a "conspiracy" between KACC and KACSI the district court had no occasion to address the intra-enterprise conspiracy issue, the district court stated that application of the conspiracy provisions of the Sherman Act here to "the singular identity of the two corporations" would "lead to an unusual result in this case" and would be a "contradiction by definition". With respect to the issue of the capacity of KACC and its wholly-owned sales subsidiary to conspire in violation of the Sherman Act, the district court stated:

"a. *Capacity to Conspire.*

"In order to recover under § 1 of the Sherman Act a plaintiff must establish (1) that there was a contract, combination or conspiracy and (2) that such contract, combination or conspiracy was in restraint of trade. *Beckman v. Walter Kidde & Company,* 316 F. Supp. 1321 (E. D. N. Y. 1970). A threshold issue is whether the parties who allegedly participated in the contract, combination or conspiracy had the capacity to conspire with each other. There is no doubt in this circuit after *Cromar Co. v. Nuclear Materials & Equipment Corp.,* 543 F. 2d 501 (3d Cir. 1976), that a wholly-owned subsidiary has the capacity to conspire with its parent to commit a Sherman Act violation despite the fact they do not hold themselves out in competition with each other. *See Coleman Motor Co. v. Chrysler Corp., supra; Higbie v. Kopy-Kat, Inc.,* 391 F. Supp. 808 (E. D. Pa. 1975); *Quigley v. Exxon Company U. S. A.,* 376 F. Supp. 342 (M. D. Pa. 1974).



*"Strict adherence to the position taken in the Cromar case would lead to an unusual result in this case. Since KACC and KACSI have the same directors and essentially the same officers, the conspiracy would be limited to one entity and thus be a contradiction by definition. The singular identity of the two corporations distinguishes this case from the fact situation presented in Cromar.* Nevertheless, the directed verdict was not granted on the ground KACC and KACSI lacked capacity to conspire with each other. For the purposes of this case I assume that the two Kaiser corporations have the capacity to conspire with each other. However, I note the factors that tend to distinguish this case from *Cromar* on the capacity-to-conspire issue." App. E, pp. A46-47.

**(ii) Relevant Product Market.**

Uncontradicted evidence introduced by plaintiff at trial demonstrated that culvert pipe made of aluminum and culvert pipe made of steel (1) are made on exactly the *same machine,* (2) are manufactured by exactly the *same producers,* (3) are sold by exactly the *same salesmen,* (4) are purchased by the *same classes of customers,* (5) have exactly the *same hydraulic properties,* (6) compete head-on for specification by engineers on the *same jobs,* (7) compete head-on as *alternative* products for many of the *same jobs,* and (8) are designed to do the *same job* and fulfill precisely the *same function.*

With respect to the pivotal question of relevant product market definition, the district court stated in its Memorandum Opinion:

(1) "The plaintiff concedes it was crucial to its case to prove that the relevant product market was limited to aluminum culvert pipe and did not

include culvert pipe fabricated from steel and concrete." App. E at A41.

(2) "It is true that these two metals have different properties and characteristics but that fact alone is insufficient to place aluminum culvert in a separate market. *United States v. Johns-Manville Corporation*, 259 F. Supp. 440 (E. D. Pa. 1966).[4]

4. In this case, Judge Van Dusen held that asbestos cement pipe was not a relevant market by itself but was in a product market that included plastic, tile and concrete pipe." App. E at A43.

(3) "By applying the *Brown Shoe Co.* criteria to aluminum culvert it is readily apparent that aluminum culvert pipe is not a proper submarket. The testimony introduced by the plaintiff at trial showed: that the production facilities for aluminum culvert pipe were not unique because the same facilities had the capability to fabricate steel culvert pipe, that customers for the two products were the same, that Columbia Metal and perhaps the other fabricator in South Carolina were the only fabricators who specialized in aluminum culvert pipe. Most others produced both aluminum and steel culvert pipe. In addition, aluminum and steel culvert pipe are not recognized by the public as separate and distinct lines. The same vendors usually sell both products, and the characteristics of the products are sufficiently similar that in most instances they are interchangeable. Finally, as was mentioned above, plaintiff's witnesses testified that Kaiser, in order to maintain its share of the market, had to price its aluminum product close to the price



of the steel product. An application of the *Brown Shoe Co.* criteria establishes that aluminum culvert pipe is not a separate submarket from steel culvert pipe." App. E at A44.

(4) "The fact that aluminum and steel have different physical characteristics that may make one or the other superior for certain culvert pipe applications is insufficient evidence of a separate submarket in light of the overwhelming evidence of direct competition and the cross-elasticity of demand between the two products. Therefore, it was appropriate to take the relevant product market issue from the jury." App. E at A46.

**(iii) Monopoly Power.**

Based on the relevant product market defined by plaintiff's own uncontradicted evidence, the district court stated:

> "In the case before this court, the defendants have less than a three percent market position in a market made up of aluminum, steel and concrete culvert pipe and a slightly higher percentage in a market consisting only of aluminum and steel pipe." App. E at A57.

Finding this degree of market share legally insignificant, the Court followed plaintiff's concession (*supra*, at 13-14) and held as a matter of law that the evidence failed to show that Kaiser possessed monopoly power in the relevant geographic and product market.

**B. The Court of Appeals.**

At oral argument in the Court of Appeals, Columbia abandoned its theory that defendants had monopolized,

conspired to monopolize, attempted to monopolize and conspired to restrain trade and commerce through predatory pricing of finished aluminum culvert pipe in the relevant geographic area and advanced as its primary contentions with respect to these defendants (1) that Columbia had introduced evidence from which a jury could rationally have inferred that KACC and its wholly-owned subsidiary, KACSI, had "conspired" within the meaning of Sections 1 and 2 of the Sherman Act to restrain trade and commerce and to monopolize trade and commerce in the alleged relevant product market of aluminum culvert pipe in the stipulated, relevant geographic market; (2) that Columbia had presented some non-adverse evidence on the *Brown Shoe* criteria of relevant product market definition which was sufficient to create a jury issue concerning product market definition; (3) that KACC and KACSI had conspired to monopolize, monopolized or attempted to monopolize such trade and commerce in violation of Section 2 of the Sherman Act by means of an alleged "price squeeze," notwithstanding that Kaiser was not Columbia's supplier during the period in question and that the allegations of predatory pricing had been abandoned; and (4) that a *prima facie* case had been established against Kaiser under Section 3 of the Clayton Act.

The Court of Appeals for the Third Circuit reversed in part and affirmed in part the judgment for defendants entered in the district court. The Court of Appeals affirmed the judgment on all counts with respect to Kaiser's local distributor, defendants Robert A. Kennedy and Kennedy Culvert & Supply Co., Inc., and affirmed the judgment in favor of Kaiser on the Clayton Act § 3 claim. The Court of Appeals, however, reversed the remaining aspects of the district court judgment, holding (1) that the question of definition of the relevant product market was one for the jury, (2) that there was sufficient evidence of a "conspiracy" between KACC and its wholly-owned subsidiary KACSI to create a question for the jury; and (3) that there was evidence that KACC and KACSI had imposed a so-called "price squeeze" [4] on Columbia, notwithstanding that neither KACC nor KACSI sold raw materials (*i.e.* aluminum coil and sheet) during the period of the alleged "price squeeze" and notwithstanding that Columbia abandoned during oral argument in the Court of Appeals any contention that either KACC or KACSI had engaged in "predatory pricing" with respect to finished aluminum culvert pipe.



**1. Intra-enterprise Conspiracy.**

The Court of Appeals rejected the district court's conclusion that application of the conspiracy provisions of the Sherman Act to KACC and its wholly-owned sales subsidiary "would lead to an unusual result in this case" (App. E at A47). In a far-reaching, expansive application of the antitrust laws which threatens long-established, traditional forms of industrial organization, the court below held that a corporation can "conspire" with *itself* within the meaning of the antitrust laws, 15 U. S. C. §§ 1 and 2, by "conspiring" with its own 100%-owned, incorporated division, notwithstanding that (1) the board of directors of the parent is *identical* to the board of directors of the subsidiary, (2) 32 of the 34 officers of the incorporated division are also officers of the parent, (3) parent and incorporated division share the same offices, (4) the incorporated division conducts no business except in connection with the sale of its parent's products, (5) parent and 100%-owned incorporated division do not compete with each other and do

4. In its paradigm case, a "price squeeze" occurs when a vertically integrated producer lowers its prices for finished goods and simultaneously increases its price for the raw materials which it sells to a non-integrated competitor in the market of the finished goods, leaving no margin of profit for the fabricator between raw material costs and the price of finished goods.

not hold themselves out as distinct or competing entities, and (6) parent and 100%-owned, incorporated division are, and are recognized by the public to be, a *single economic unit.*

Disregarding these economic realities, the Court of Appeals adopted a rigid, formalistic rule holding that the mere fact of incorporation of the sales division was a sufficient basis for capacity to conspire (App. D at A28-29):

> "The first combination alleged to violate § 1 arises out of the joint activities of KACC and KACSI. KACSI is a wholly-owned subsidiary of KACC, sharing joint management on several levels of operation. Because of this, KACSI and KACC suggest that they are incapable of conspiring together. Though legally distinct for most purposes, defendants argue, the reality of the corporate structure of KACC and KACSI negatives the plurality of actors legally necessary to form an illegal conspiracy.
>
> "This argument is not well-founded in law, for the prerequisites of a conspiracy under § 1 are fulfilled by the presence of two or more legally distinct corporations. Indeed, we recently had occasion to reject a contention of legal inability to conspire with regard to subsidiaries which were 'part of an integrated Chrysler enterprise engaged in the manufacturing and marketing of automobiles.' The claim that such corporation could not form a § 1 conspiracy, we held, was foreclosed by a line of cases in this Court reaffirming the viability of the 'intra-enterprise conspiracy' theory as applied to separately incorporated entities."

**2. Relevant Product Market.**

The Court of Appeals reversed the district court's conclusion on relevant product market and held in this



case that evidence presented by a plaintiff with respect to, at most, *one* of the *seven* criteria laid down by the Court in *Brown Shoe Co., Inc. v. United States,* 370 U. S. 294 (1962), for definition of a relevant product market in an antitrust case,[5] is *sufficient* to create a jury issue on the question of relevant product market, notwithstanding overwhelming, uncontradicted, adverse evidence on the remaining *six* criteria mandated for consideration by this Court's decision in *Brown Shoe.*

**3. The "Price Squeeze" Theory.**

Frankly admitting that *"this may not be a classic predatory pricing endeavor"* (App. D at A24), the Court below announced a startling, unprecedented and ill-considered holding that evidence that KACC, a vertically integrated manufacturer, on occasion transferred aluminum coil or sheet on the books of the company to its 100%-owned, incorporated division at inventory values or "transfer prices" less than their estimated cost presented a jury issue and supported a competitor's claim that KACC and its 100%-owned, incorporated division had "conspired" with predatory intent to restrain trade in the sale of finished aluminum culvert pipe fabricated from the sheet and coil. Reversing the judgment, the Court gave legal recognition to a claimed "price squeeze" supposedly applied by a vertically integrated company to destroy a non-integrated

5. In *Brown Shoe* the Court held that a relevant product market, used as the foundation and starting point for economic analysis of "monopoly power," must include all products which are "reasonably interchangeable." Under *Brown Shoe* "reasonable interchangeability" is to be assessed in terms of the criteria of (1) "industry or public recognition of the submarket as a separate economic entity"; (2) "the product's peculiar characteristics and uses"; (3) "unique production facilities"; (4) "distinct customers"; (5) "distinct prices"; (6) "sensitivity to price changes"; and (7) "specialized vendors".

competing fabricator who, during the period of the alleged "price squeeze," purchased no raw materials from Kaiser. The Court reached this result notwithstanding that Columbia had abandoned any claim that Kaiser sold finished pipe at predatorily low prices.



## REASONS FOR GRANTING THE WRIT.

### I. The Court Should Grant Certiorari to Settle the Conflict Among the Circuits Concerning Applicability of the Sherman Act to Corporations and Their Wholly-Owned, Non-Competing Subsidiaries Under the So-Called "Intra-Enterprise Conspiracy Theory".

While the issue concerning applicability of the conspiracy provisions of the Sherman Act to affiliated corporations has been before the Court in *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *Perma Life Mufflers v. International Parts Corp.*, 392 U. S. 134 (1968), and most recently *United States v. Citizens & Southern National Bank*, 422 U. S. 86 (1975), the Court has never settled the very important core question whether a corporation may be found guilty of "conspiring" with its own wholly-owned, noncompeting subsidiary when parent and subsidiary comprise a single economic enterprise.

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra,* where the evidence showed that two subsidiaries of a common parent corporation held themselves out to the public as separate manufacturers of liquor products having different labels, actually competed against each other in the sale of such products and maintained separate offices, had their own officers, kept their own books, dealt with the public separately, never held themselves out to the public as having any connection with each other, and were "really competitors" (*Kiefer-Stewart* Record at 152), the Court referred to (340 U. S. at 215):

> ". . . our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. United States v. Yellow Cab Co., 332 U. S. 218."

The Court there also intimated that the applicability of the Sherman Act to closely affiliated, but separately incorporated, companies might involve considerations such as whether the corporations held themselves out as competitors, or actually competed (340 U. S. at 215):

> "The rule is *especially applicable* where, as here, respondents hold themselves out as competitors." (Emphasis added)

More recently in *United States v. Citizens & Southern National Bank*, 422 U. S. 86 (1975), which involved the question whether the historic *de facto* branch bank relationship existing between a Georgia city bank and the suburban banks in which it owned a 5% interest constituted a conspiracy in unreasonable restraint of trade under Section 1 of the Sherman Act, the Court, citing this line of cases, again intimated that a factor emphasized in *Kiefer-Stewart* was a relevant consideration in the application of the Sherman Act to affiliated corporations (422 U. S. at 114):

> "This Court has held that even commonly owned firms must compete against each other *if they hold themselves out as distinct entities.*" (Emphasis added)

The implication of the above caveat in *Citizens & Southern National Bank* and the special emphasis on competition in *Kiefer-Stewart* is that the Sherman Act conspiracy provisions do *not* apply to a corporation and its wholly-owned subsidiary where parent and subsidiary do not "hold themselves out as competitors" (*Kiefer-Stewart, supra*); do not "hold themselves out as distinct entities" (*Citizens & Southern National Bank, supra*); and do not compete with each other, but comprise a single economic entity.

This reading of *Kiefer-Stewart* and *Citizens & Southern National Bank* is confirmed in an analogous context



in the Court's opinion regarding the scope of the Capper-Volstead Act antitrust exemption for agricultural cooperatives in *Sunkist Growers v. Winckler & Smith Citrus Products, Co.*, 370 U. S. 19 (1962), decided after *Kiefer-Stewart*. There the Court unanimously held that a parent agricultural cooperative organization and its wholly-owned subsidiary were in practical effect *one* organization within the meaning of 15 U. S. C. § 7 and 7 U. S. C. § 291, and that in their interorganizational dealings they were immune from the conspiracy provisions of the antitrust laws even though they were separately incorporated. The Court said (370 U. S. at 29):

> "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimus meaning and effect to these growers who have banded together for the processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. *There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations.* That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts." (Emphasis added)

In *Perma Life Mufflers v. International Parts Corp., supra*, the Court's opinion touched the question, but it appears there was record evidence in that case that the companies involved there, Midas and International, *"held themselves out as separate and 'divorced'"* which precluded summary judgment:

"With respect to the majority's alternative basis discussed at p. 13 *supra*, this record shows that Midas and International held themselves out as separate and 'divorced.' Therefore, *Kiefer-Stewart Co. v. Joseph E. Seagram & Son, Inc.*, 340 U. S. 211, does not permit defendants to claim that as a single business entity they were unable to conspire."

*Perma Life Mufflers, Inc. v. International Parts Corporation*, 326 F. 2d 692 705 (7th Cir. 1967) (dissenting opinion of Judge Cummings)

As the opinion below in this case illustrates, the lower courts are confused and divided on this question of fundamental importance to the nationwide administration of the antitrust laws to parent-subsidiary, intracorporate operations. A decision in this case is essential to restore national uniformity in the interpretation of the antitrust laws.

In *Knutson v. Daily Review, Inc.*, 548 F. 2d 795, 802 n. 5 (9th Cir. 1975), *cert. denied*, 433 U. S. 910, the Court of Appeals for the Ninth Circuit said:

"The Court's suggestion in *Kiefer-Stewart* that commonly-owned firms who pretend to be competitors must act like competitors has created some confusion in the lower courts."

In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied*, 396 U. S. 1062, the same court noted (416 F. 2d at 82):

"The Supreme Court has said that "common ownership and control does not liberate corporations from the impact of the antitrust laws." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc. 1951, 340 U. S. 211 [citations omitted] *The Court has never indicated what, if any, are the limits of this doctrine.*" (Emphasis added)



The Court of Appeals for the Eighth Circuit expressed the same view in *T. V. Signal Company of Aberdeen v. American Telephone & Telegraph Co.*, 462 F. 2d 1256, 1260 (8th Cir. 1972):

". . . [T]he extent of the intracorporate conspiracy doctrine has not yet been settled."

The Court of Appeals for the Second Circuit in *International Railways v. United Brands, Inc.*, 532 F. 2d 231, 240 (2d Cir. 1976), refused to decide the issue again (see *Syracuse Broadcasting Corp. v. Newhouse*, 319 F. 2d 683 (2d Cir. 1963), affirming a directed verdict) where an alternative ground was available, describing the question as a *"thicket"*.

One lower court in *Joe Westbrook, Inc. v. Chrysler Corp.*, 419 F. Supp. 824, 843 (N. D. Ga. 1976), commenting on "the uncertainty in the law on this subject", recently stated its inability to decide the issue and pointed to the need for "definitive answers" from this Court and noted that "[e]ven the commentators seem a bit confused":

"Thus the question whether competition is required among affiliated corporations to properly state a claim under Section 1 of the Sherman Act remains unanswered. *The Supreme Court has provided no definitive answers.* The Seventh and Eighth Circuits hold that such competition is unnecessary. The Third Circuit's position is one of confusion. And the issue has been resolved both ways in a number of district courts. The question is presently before this Court on a motion for summary judgment. Set against the uncertainty in the law on this subject, the Court finds that resolution of the issue is best deferred until a

complete disclosure of the facts, motives, and effects of any agreement between the defendants is revealed." (Footnote omitted and emphasis added.)

The Courts of Appeals for the Second, Fourth, and Ninth Circuits have interpreted *Kiefer-Stewart* and the other decisions of this Court to require evidence that parent and wholly-owned subsidiary compete with each other or hold themselves out to the public as distinct entities. *Syracuse Broadcasting Corp. v. Newhouse*, 319 F. 2d 683 (2d Cir. 1963) (directed verdict for defendants affirmed); *Beckman v. Walter Kidde & Co.*, 316 F. Supp. 1321 (E. D. N. Y. 1970), *aff'd*, 451 F. 2d 593 (2d Cir. 1971), *cert. denied*, 408 U. S. 922 (1972) (summary judgment for defendants affirmed); *REA Express, Inc. v. Alabama Great Southern R. R.*, 427 F. Supp. 1157 (S. D. N. Y. 1976) (Friendly, J. sitting by designation, stating the intra-enterprise conspiracy doctrine has been "repudiated by several commentators, including the Justice Department officials charged with enforcing the antitrust laws." 427 F. Supp. at 116), *aff'd*, 550 F. 2d 1342 (1976); *Call Carl, Inc. v. BP Oil Corporation*, 403 F. Supp. 568 (D. Md. 1975), *aff'd*, 554 F. 2d 623 (4th Cir. 1977) (directed verdict for defendants affirmed) *cert. denied*, 46 U.S.L.W. 3293.

The Third, Fifth, Seventh and Eighth Circuits adopt a formalistic approach which gives practical, controlling significance to the mere fact of formal incorporation. *Cromar Co. v. Nuclear Materials & Equip. Corp.*, 543 F. 2d 501, 511-512 n. 8 (3d Cir. 1976) and the opinion in this case, App. D hereto; *Battle v. Liberty National Life Insurance Co.*, 493 F. 2d 39 (5th Cir. 1974), *cert. denied*, 419 U. S. 1110; *Tamaron Distributing Corp. v. Weiner*, 418 F. 2d 137 (7th Cir. 1969); *Minnesota Bearing Co. v. White Motor Corp.*, 470 F. 2d 1323 (8th Cir. 1973).



The law within some of the Circuits is somewhat confused. *See, Battle v. Liberty National Life Insurance Co., supra. Compare, Ark Dental Supply Co. v. Cavitron Corp.*, 461 F. 2d 1093 (3d Cir. 1972) ("There is ample authority for holding that the conspiracy required to find a § 1 violation cannot be found since . . . *Coles and Cavitron have never held themselves out as competitors.*" per Aldisert, J.) with *Cromar v. Nuclear Materials & Equip. Corp.*, 543 F. 2d 501, 511-512 n. 8 (3d Cir. 1976) and the panel opinion of the Court of Appeals in the present case, App. D.

The application of Sherman Act conspiracy provisions by some lower courts to this situation has been subjected to trenchant criticism by distinguished commentators on the antitrust laws. *See, e.g.*, Handler, "Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review," 57 Cal. L. Rev. 182-187 (1969) ("repugnant to common sense"); Handler, "Twenty-Five Years of Antitrust," 73 Colum. L. Rev. 415, 452-453 (1973) ("[E]xalts form over substance" and has "[n]o policy justification"); Willis and Pitofsky, "Antitrust Consequences of Using Corporate Subsidiaries," 43 N. Y. U. L. Rev. 20 (1968).

Judge Friendly has noted in *REA Express, Inc. v. Alabama Great Southern R. R., supra*, 427 F. Supp. 1157, that the doctrine has even been "repudiated" by the Justice Department.

The Antitrust Division of the Department of Justice has formally repudiated the doctrine. In a letter dated February 22, 1971, from the Honorable Richard W. McLaren, Assistant Attorney General, Antitrust Division (a distinguished student of the antitrust laws) to Thomas J. O'Connell, General Counsel, Board of Governors of the Federal Reserve Board, provoked by expressed "uncertainty in the banking community with respect to the ap-

plication of what is known as the 'intracorporate conspiracy doctrine,'" the Antitrust Division stated its policy in this regard:

> "ENFORCEMENT APPLICATION OF THE INTRA-ENTERPRISE CONSPIRACY CONCEPT
>
> "A corporation may establish subsidiaries for various financial, legal or commercial reasons. Since such multiple corporations have an identical goal—to earn profits for their common owner—they should not be expected to act with respect to each other as if they were independent competitors.
>
> The Department of Justice has adopted a policy of using the intra-enterprise conspiracy doctrine to challenge, under Section 1 of the Sherman Act, practices engaged in by commonly-controlled firms only where the practice has a coercive or restrictive effect on outsiders. As a result, we have not challenged, and do not expect to challenge, internal arrangements within a corporate group as to prices or markets for the products or services of the corporation within the group; this is a traditional corporate management function.
>
> * * *
>
> "The intra-enterprise conspiracy doctrine is a particularly difficult area of antitrust law. However, it should not deter use of arrangements confined solely to a corporate parent and its subsidiaries, where no outside parties are involved and there is no coercion of third parties."

Here, as in *Sunkist Growers*, the fact of separate incorporation is a distinction of *"de minimis* meaning" and has no economic significance. The expansive rule adopted



by the Third, Fifth, Seventh and Eight Circuits on this question of fundamental importance is one which allows a corporation to bring itself into compliance with the antitrust laws merely by dissolving its subsidiaries.[6] Such a rule plainly exalts form over substance and without policy justification sweeps within the ambit of the conspiracy provisions of the Sherman Act normal business dealings and traditional corporate organization.

The Court should grant the petition for a writ of certiorari to settle the conflict among the circuits and clarify the law on a central question of interpretation of the federal antitrust laws.

## II. The Court Should Grant Certiorari to Clarify the Contours of the "Price Squeeze" Theory of Sherman Act Liability of Vertically Integrated Manufacturers.

A "price squeeze", in the situation described by Judge Learned Hand in *United States v. Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945) ("the *Alcoa* Case"),[7] occurs when a vertically integrated producer which sells raw materials to a non-integrated customer with which it competes in the sale of finished goods, lowers the price of the finished goods it sells in competition with its customer and simultaneously increases the price charged

6. This is illustrated by antitrust litigation involving Joseph E. Seagram & Sons, Inc. after the *Kiefer-Stewart* decision. See, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 415 F. 2d 71 (9th Cir. 1969).

7. The *Alcoa* Case came before the Court of Appeals for the Second Circuit by virtue of a special statute (now 28 U. S. C. § 2109); see also *United States v. United States District Court*, 334 U. S. 258, because, by reason of disqualifications, this Court could not muster a quorum. Accordingly, the Court has said that "That case was decided by the Circuit Court of Appeals for the Second Circuit under unique circumstances which add to its weight as a precedent." *American Tobacco Co. v. United States*, 328 U. S. 781, 811 (1946).

to the competing customer for the necessary raw materials to the point where the margin of profit of the non-integrated company is eliminated. *Alcoa* recognized the phenomenon only where the competitor is a raw material customer and there is proof that (1) the raw material price charged to the non-integrated competitor was *higher* than a "fair price," (2) the integrated producer possesses a monopoly in the raw material market, and (3) the integrated producer has monopoly power in the fabricated goods market by virtue of which it is able to drive down the price of finished product while raising the price of the raw material.

In this case, the Court below has misapplied and expanded the "price squeeze" principle of *Alcoa* without reference to the rationale of Judge Hand's analysis. The Court held that KACC and KACSI, its wholly-owned, non-competing subsidiary, may "conspire" together to effect an unlawful "price squeeze," even where: (i) Columbia's own uncontradicted evidence showed that Kaiser never sold aluminum sheet or coil (used in the fabrication of aluminum culvert pipe) to Columbia after 1970, and did not sell coil *at all* in the mid-Atlantic area (stipulated by the parties to be the relevant geographic market) after January, 1974 (Tr. 825: 7-12);[8] (ii) there was no evidence that Kaiser *ever* sold aluminum sheet or coil at a price higher than a "fair price" to plaintiff or any other person; (iii) there was no evidence that Kaiser possessed or exercised monopoly power, or was a dominant factor, in the relevant raw material market in sheet and coil;[9] (iv) Columbia expressly *abandoned* at oral argument in the Court of Appeals any contention that Kaiser had engaged in predatory pricing of finished aluminum culvert pipe in the stipulated relevant geographic market. The novel doctrine adopted below is wholly inconsistent with the *Alcoa* case, which, by reason of the unique circumstances surrounding the decision, is to be accorded added weight as precedent in this Court.

8. The "squeeze" was alleged to have occurred during 1974.

9. While Columbia never proved what the relevant "raw material" market was, what evidence there is in the record showed unremitting price competition and interchangeability in the culvert market between aluminum sheet and coil and steel sheet and coil. Significantly, the Court below also found plaintiff had failed to prove a relevant raw material line of commerce on the Clayton Act § 3 claim. App. D at p. A36.



The writ of certiorari should be granted to examine an important and novel expansion of the "price squeeze" doctrine enunciated in *Alcoa*.

## III. The Court Should Grant Certiorari to Clarify the Standard Adopted in Brown Shoe v. United States for Definition of Relevant Product Market in Antitrust Cases.

In *Brown Shoe Co., Inc. v. United States*, 370 U. S. 294 (1962), this Court held that the definition of the relevant product market in antitrust cases is to turn on an assessment whether products are "reasonably interchangeable," a determination guided by seven criteria: (1) "industry or public recognition of the submarket as a separate economic entity"; (2) "the product's peculiar characteristics and uses"; (3) "unique production facilities"; (4) "distinct customers"; (5) "distinct prices"; (6) "sensitivity to price changes"; and (7) "specialized vendors".

This Court's decision in *United States v. E. I. DuPont de Nemours & Co.*, 351 U. S. 377, 394 (1956) ("the *Cellophane Case*"), teaches that ". . . [w]here there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market."

The decision below is at odds with this Court's decisions in the *Brown Shoe* case and the *Cellophane Case*, and is in conflict with the teaching of decisions in other circuits that *"mere physical differences between one product and others will not alone isolate that product in a separate submarket." See, e.g. George Whitten, Jr. v. Paddock Pool Builders, Inc.*, 508 F. 2d 547, 553 (1st Cir. 1974), *cert. denied*, 421 U. S. 1004 (1975) (Coffin, J.).

At the trial in this case, Columbia introduced uncontradicted evidence that culvert pipe made of aluminum and culvert pipe made of steel (1) are made on exactly the *same machine*, (2) are manufactured by exactly the *same producers*, (3) are sold by exactly the *same salesmen*, (4) are purchased by the *same classes of customers*, (5) have exactly the *same hydraulic properties*, (6) compete head-on for specification by engineers on the *same jobs*, (7) compete head-on as alternative products for many of the *same jobs*, and (8) are designed to do the *same job* and fulfill precisely the *same function*.

The Court below gave controlling weight to equivocal evidence presented by plaintiff on one criterion, that of mere physical differences between aluminum culvert pipe and steel culvert pipe, in determining that Columbia presented sufficient basis for a jury to conclude that the relevant product market in this antitrust case is an extraordinarily narrow one confined to culvert and drainage pipe made from aluminum, alone.

Petitioners respectfully request that the writ of certiorari be granted to correct this departure from the teaching of the *Cellophane Case*, to resolve a conflict between the Court of Appeals for the Third Circuit and the Court of Appeals for the First Circuit and to clarify the proper application of the *Brown Shoe* criteria to relevant product definition in antitrust cases.



## IV. The Court Should Grant Certiorari to Resolve Important Questions of Statutory Construction Under the Sherman Act Involved in the Nationwide Enforcement of the Antitrust Laws.

Review of the questions presented in this petition is of critical importance to assure the proper, uniform application of the antitrust laws in a fashion that does not threaten traditional forms of corporate organization in the American economy.

There are "more than 8,000 parent companies in America which own or control more than 90,000 domestic and overseas subsidiaries." *Directory of Intercorporate Ownership (Who Owns Whom in America)*, ed. J. L. Angel (1974). This figure includes most of the major corporations which constitute the life-blood of the American economy.

The unrestricted application of the conspiracy provisions of the Sherman Act to relationships between parent corporations and their wholly-owned subsidiaries, illustrated by the decision below in this case, immediately introduces into a broad range of American business operations an intolerable element of arbid formality and inflexibility which exalts form over important commercial substance and is alien to the sound policies of the antitrust laws.

The Court should grant certiorari in this case to resolve fundamental questions concerning the proper scope of the antitrust laws in their common-sense application to the realities of American business.

## V. CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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## APPENDIX A.

**Order of the Court of Appeals Granting Appellees' Motion for Stay Pending Application for a Writ of Certiorari.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1846

COLUMBIA METAL CULVERT CO., INC.,
Appellant

*v.*

KAISER ALUMINUM & CHEMICAL CORP., KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY CO., etc.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 27, 1978.

ARLIN M. ADAMS
*Circuit Judge*

Dated: June 29, 1978

## APPENDIX B.

**Order of the Court of Appeals En Banc Denying Appellees' Petition for Rehearing.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1846

COLUMBIA METAL CULVERT CO., INC.,
Appellant

KAISER ALUMINUM & CHEMICAL CORP., et al.,
Appellees

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

ARLIN M. ADAMS
*Circuit Judge*

Dated: June 21, 1978



## APPENDIX C.

**Judgment of the Court of Appeals.**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1846

COLUMBIA METAL CULVERT COMPANY, INC.,
Appellant

*v.*

KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY COMPANY

(D. C. Civil No. 74-122)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS and HIGGINBOTHAM, *Circuit Judges* and MARKEY*, *Chief Judge of the Court of Customs and Patent Appeals*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District

* Sitting by designation.

of Pennsylvania and was argued by counsel on February 22, 1978.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 2, 1977, be, and the same is hereby affirmed as to the defendants Kennedy Culvert and Robert Kennedy. As to KACC and KACSI, the said judgment of the said District Court be and the same is hereby affirmed insofar as it granted a directed verdict against plaintiffs on the Clayton Act claims; the remainder of the said judgment of the said District Court be, and the same is hereby reversed, and the cause remanded for action consistent with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
*Clerk*

May 24, 1978



## APPENDIX D.

### Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1846

COLUMBIA METAL CULVERT COMPANY, INC.,
Appellant

*v.*

KAISER ALUMINUM & CHEMICAL CORPORATION, KAISER ALUMINUM & CHEMICAL SALES, INC., ROBERT A. KENNEDY and KENNEDY CULVERT & SUPPLY COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-122

Argued February 22, 1978

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges,* and MARKEY, *Chief Judge of the Court of Customs and Patent Appeals.*

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OPINION OF THE COURT

(Filed May 24, 1978)

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ADAMS, *Circuit Judge*

Antitrust litigation seldom partakes of elegant simplicity. Its elaborations find expression both in the intricacies of finely woven legal theory and in the expansiveness of painstakingly detailed factual submissions. In the face of such complexity, considerable value attaches to efforts by the trial judge to confine the task of the jury to manageable dimensions by the judicous use of directed verdicts. Nonetheless, the Seventh Amendment guarantees a party the right to commit the task of determining facts in civil proceedings to a jury. And the difficulties of deciphering the import of extensive and conflicting evidence may not be allowed to disturb the exercise of that right.



In the matter before us, the resolution of charges of antitrust violations in the market for aluminum culvert pipe turns on disputed factual issues of conspiracy, motive, and market definition. The trial judge, however, deemed it appropriate to enter a directed verdict at the close of the plaintiff's case. We are now called upon to determine whether the extensive trial record permitted such an action.

A. FACTS

1. *The Parties*

This proceeding arose out of the interaction of five entities: Columbia Metal Culvert Company, Inc. (the plaintiff), Kaiser Aluminum & Sales, Inc. (KACSI), Kaiser Aluminum Chemical Corporation (KACC), Robert Kennedy, and Kennedy Culvert & Supply Company.

The plaintiff in this case originated in 1959, when Joseph Bonjourno founded Columbia Steel, a corporation that was to fabricate metal culvert pipes used in highway construction. Three years later, after some financial difficulties, Columbia was reconstituted as Columbia Metal Culvert, the current platintiff. Columbia Metal's plant in Vineland, New Jersey, specialized in the manufacture of aluminum culvert pipes, which the company then marketed.

KACC and its wholly owned subsidiary, KACSI, constitute the second alignment in the case. KACC manufactures aluminum sheet and coil, from which aluminum culvert pipe, such as Columbia's product, is constructed; it then conveys these pipes to KACSI, at a "transfer price" which is not necessarily reflective of either costs or market price. KACSI in turn sells the sheet and coil to pipe fabricators such as Columbia. In addition, KACSI fabricates

and sells alumnium culvert pipe itself in competition with the fabricators to whom it supplies sheet and coil. KACSI sells 80% of the aluminum culvert pipe in the United States, although only 79% of its pipe output is aluminum (the rest being steel). Neither of the other large aluminum producers manufactures aluminum culvert.

The third set of parties before us is comprised of Kennedy Culvert & Supply Company, a distributor of KACSI culvert pipe in Southern New Jersey, and its owner, Robert Kennedy, a former salesman for Columbia Metal.

2. Background of Dispute

In earlier times, the parties had enjoyed a close business relationship. Columbia's decision in 1962 to begin producing aluminum culvert was encouraged by KACC and KACSI, who supplied technical assistance, as well as all of Columbia's raw materials. Columbia was one of the few strictly aluminum culvert manufacturers in the country and KACSI manifested an interest in using Columbia as a spearhead to break into the culvert market—a market which had previously been dominated by steel and concrete products. In these amicable years, Robert Kennedy was one of the most successful of Columbia's salesmen.

The core of Columbia's antitrust claim is that in 1971, when Columbia decided to place some of its aluminum orders with Reynolds Aluminum, KACSI determined to put Columbia out of business in retaliation. After learning of the errant orders, the evidence reveals, KACSI refused to sell aluminum to Columbia.[1] In addition,

1. While the defendants dispute the allegation that KACSI refused to sell to Columbia, there is ample evidence to allow a jury to find that such was KACSI's policy. N. T. 163, 943-44, 2057-59, 2294.



Columbia alleges that in an act of vengeance for Columbia's infidelity, KACSI decided, with KACC's approval, to locate a new culvert manufacturing plant in New Castle, Delaware, within fifty miles of Columbia's plant in Vineland, New Jersey, despite the fact that KACSI's new production unit had earlier been slated for Virginia. Because of the high cost of transporting culvert, there is evidence that the Delaware location meant that Columbia would become subject to severe new competition from KACSI culvert.

At the same time, Columbia maintains, KACSI conspired with Robert Kennedy, still a Columbia salesman, to set Kennedy up in business as an independent distributor of KACSI products in the Vineland area, and thereby to complete the destruction of Columbia's market. Columbia charges that Kennedy used confidential knowledge he had gained from his work with Columbia to underbid Columbia, and that Kennedy and KACSI conspired to avoid competing with one another.

Finally, Columbia claims that it was the victim of a price squeeze consciously engineered by KACSI and KACC to drive independent fabricators such as Columbia out of business. Sheet and coil were transferred from KACC to KACSI below cost, enabling KACSI to make a "profit" on sales of aluminum pipe at prices too low to be matched by independents who had to buy their sheet and coil at market prices. Simultaneously, it is claimed KACSI, with KACC's concurrence, contrived to raise the price of raw materials confronting Columbia.

As a result of these maneuvers, Columbia asserts it was driven out of business.

3. *The Litigation*

In 1974, Columbia brought the present law suit, which charges Kennedy, KACSI, and KACC with violations

of §§ 1 and 2 of the Sherman Act. In addition, the complaint alleges that KACSI is guilty of an infraction of § 3 of the Clayton Act by its attempt to insist that Columbia deal exclusively with KACSI for coil and sheet.

After the jury had heard the twelve days of testimony comprising the plaintiff's case, the trial judge directed a verdict for the defendants on all of Columbia's claims. Judge Cahn held:

1. The evidence "tended to establish" that the relevant market in the case was not, as Columbia contended, a market for aluminum culvert, of which KACSI controlled 80%, but a market for both steel and aluminum culvert, where KACSI sales represented less than 10%.[2]

2. As a result, KACC/KACSI could not be guilty of monopolization in violation of § 2 of the Sherman Act since they possessed no monopoly power in the relevant market.

3. Neither could KACC/KACSI be guilty of attempted monopolization since the limited market position precluded a "dangerous probability of success."

4. KACC, KACSI and Kennedy could not be liable for conspiracy to monopolize, on the ground that insufficient evidence had been adduced for a jury to find either specific intent to monopolize or a conspiracy to monopolize in the relevant product market.

2. Since this was a motion for a directed verdict after the plaintiff's case was completed, we understand that Judge Cahn ascertained that a jury could not have reasonably determined that the market in question consisted solely of aluminum culvert.



5. A jury could not find KACC and KACSI guilty of a conspiracy or combination in restraint of trade under § 1 of the Sherman Act, since not enough evidence had been presented to allow a reasonable inference or conspiracy between KACSI and KACC, and because the market share was too small to allow a finding of restraint of trade.

,6. Kennedy and KACSI could not be held liable for conspiracy in restraint of trade because there was inadequate evidence to allow a jury to find a conspiracy between Kennedy and KACSI, a substantial restraint of trades, or an intent to put Columbia out of business.

7. The failure to present evidence on the proper definition of the market for the Clayton Act claim precluded a finding in plaintiff's favor on that issue.

Columbia has appealed each aspect of the directed verdict.

B. Standard of Review

As the trial judge recognized, in evaluating defendants' motion for a directed verdict, the question is whether sufficient evidence has been introduced, when viewed in the light most favorable to the plaintiff and allowing all reasonable inferences in its behalf, to allow a jury to find that relief is warranted.[3]

The badinage between the plaintiff and defendants in this case over whether "some" evidence, "substantial"

3. *See Patzig v. O'Neill*, typescript p. 4-5, (No. 77-1190, 3d Cir. 1978); *Denneny v. Siegel*, 407 F. 2d 433, 439 (3d Cir. 1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696 n. 6 (1962).

evidence, "any" evidence or a "scintilla" of evidence is necessary in order to defeat a motion for directed verdict impels us to reiterate the Supreme Court's comments of 35 years ago in *Galloway v. United States*: [4]

> Nor is the matter greatly aided by substituting one general formula for another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence" or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation not be allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.

Where the issues are ones for resolution by the jury, the judge may deprive the jury of its role at trial only where such action is necessary to guard against a verdict founded solely on "mere speculation."

C. The Market

The fulcrum of the district court's opinion was its determination that no jury could reasonably find the relevant market in this case to be composed of any spectrum of products more restricted than "aluminum culvert and steel culvert." This determination reduced the market position of the defendants, as proved at trial, from over 80% of the aluminum market to less than 10% of the aluminum and steel market.[5] Such a reduction in market share allowed the trial judge to proceed to draw the conclusions that the case contains no adequate evidence to allow the jury to find monopolization, dangerous probability of monopolization, or restraint of trade. The correctness of the district judge's market determination, therefore, must frame the analysis of the charges brought by Columbia.

4. 319 U. S. 372, 395 (1943).

5. The defendants claim that even if the plaintiff's market definition is accepted, no competent testimony in the record establishes the proportion of aluminum culvert manufactured by KACSI in the agreed upon five state geographical market. Since the unrefuted testimony of Mr. Bonjuorno, who traded extensively in the geographical market, asserts that the KACSI market share is "around 80%," and since that figure accords with KACSI/KACC's admitted 80% share of the aluminum culvert market nationwide, there is sufficient evidence in the record on this point to defeat a motion for directed verdict.

Similarly, while we can find no evidence establishing KACSI's proportion of the steel and aluminum market, both counsel agreed at oral argument that the figure was less than 10%.



1. *The Mode of Market Definitions*

Well-settled principles govern the delineation of the relevant product market in an antitrust case, even if the outcome of their application to individual fact patterns is often less than obvious.

The "monopoly" condemned by § 2 of the Sherman Act [6] inheres in "the power to control prices or exclude competition." [7] To the extent that competition from related products limits the market power of an entity with a dominant position in one product, such an entity is less likely to be found to hold "monopoly" power forbidden by law. This is so for the ongoing competition from other products guards against the ability of the dominant entity to increase prices and makes exclusionary tactics by such a

6. 15 U. S. C. § 2 proscribes the actions of:

> Every person who shall monopolize or attempt to monopolize, or conspire, or conspire with any other person or persons to monopolize any part of trade or commerce among the several states.

7. *United States v. E. I. duPont & Co.*, 351 U. S. 377, 391 (1956) *quoted in United States v. Grinnell Corp.*, 384 U. S. 563, 571 (1966).

party fruitless, impossible or unbearably expensive. Thus in resolving the proportion of the "market" controlled as a prelude to an examination of the extent of a firm's power to control prices or exclude competition, the courts look to range of "commodities reasonably interchangeable by consumers for the same purposes." [8]

Similarly, in the context of § 1's prohibition of conspiracies in restraint of trade, except where practices fall under a judicially crafted *per se* ban, a finding of illegality presupposes a determination in any given case that the "effect upon competition in the marketplace is substantially adverse." [9] This inquiry, in turn, necessitates an examination of the boundaries of real competition. As the Supreme Court stated in *Times-Picayune Publishing Co. v. United States* "our inquiry to determine reasonableness under § 1 must focus on 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.'" [10]

Therefore, under either § 1 or § 2 of the Sherman Act, judges must attempt to ascertain the flow of commercial interactions. And in exploring this pattern of com-

8. *United States v. DuPont, supra* 351 U. S. at 395.

9. *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1346 (3d Cir. 1975), *quoting United States v. Arnold Schwinn & Co.*, 388 U. S. 365, 375 (1967). *See Sitkin Smelting & Refining* typescript at 13. (No. 77-1003/4, 3d Cir. 1978). Even in some classes of cases which fall within the "*per se*" rule market power is relevant to a finding of violation. *See e.g. United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U. S. 610, 619-22 (1977) (tying requires market power); *Continental TV Inc. v. GTE Sylvania* 433 U. S. 36, 65-66 (1977) (White, J. concurring).

10. 345 U. S. 594, 615 (1953). *See id.* at 612 n. 31 ("For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variation in price, only a limited number of buyers will turn . . .); *Coleman Motor supra, American Motor Inns v. Holiday Inns*, 521 F. 2d 1230, 1247 (3d Cir. 1975).



petition, courts are adjured to follow the well-trodden trail illuminated by the late Chief Justice Warren in *Brown Shoe Co., Inc. v. United States:* [11]

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist for antitrust purposes. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics or uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

11. 370 U. S. 294, 325 (1962). *Brown Shoe* was a § 1 case, but its submarket analysis was adopted in a § 2 context in *United States v. Grinnell Corp.* 384 U. S. 563, 572 (1966).

As we have intimated in prior cases, the inquiries into the scope of competition under § 1 and § 2 are not precisely the same. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1347-48, 1349 (3d Cir. 1975) (market definition sufficient for § 1, not § 2); *Glauser Dodge Co. v. Chrysler Corp.*, No. 76-2390/77-1188 (3d Cir. 1977) slip op. at 17 n. 17, *cert. denied* May 22, 1978 (distinguishing § 1 market definition from § 2 market). *See Fount Wip v. Reddi Wip Inc.*, 568 F. 2d 1296, 1301 (9th Cir. 1978) (§ 1 verdict affirmed, § 2 verdict reversed on failure to prove market adequately), *cf. United States v. E. I. DuPont & Co.*, 351 U. S. 377, 395 n. 23 (1956) (distinguishing between monopolization, attempt to monopolize and conspiracy to monopolize with regard to market deflnition). The § 2 market definition looks to the existence of competitors as evidence of countervailing power which would preclude monopolization. § 1, in contrast, is concerned with patterns of competition as a means of judging whether a restraint of trade is unreasonable. Thus, rival products might provide sufficient competition to foreclose a finding of monopolization, yet the degree of insularity of the initial product might allow a finding of illegal restraint of trade in regard to restrictions imposed within that initial market. For instance, stifling intra-brand competition may violate § 1, while "monopoly" over a given brand would clearly not run afoul of § 2. *See Continental T. V. Inc. v. GTE Sylvania*, 433 U. S. 36, 52 n. 19, 53, 59 (1977).

That path, however, has led to a variety of destinations. It is true, as the defendants here point out, that the Supreme Court in *DuPont*, a § 2 controversy, refused to treat "cellophane' 'as a product market distinct from other flexible wrapping paper. [12] Yet, in subsequent cases, the Court has countenanced the separation of "accredited central station alarm systems" from non-accredited alarms, noncentral station alarms, and watchman services; [13] the distinction between markets for insulated aluminum and insulated copper wire, despite the fact that the same customers bought each for similar purposes; [14] and the differentiation between championship boxing matches and all other boxing matches.[15] Thus, the breadth of the spectrum of products which have been held to constitute "markets" for antitrust purposes bears out the Supreme Court's observation in *United States v. Continental Can* that:

12. *United States v. E. I. duPont & Co.*, 351 U. S. 377 (1956).

13. *United States v. Grinnell Corp.*, 384 U. S. 563, 573 (1966).

14. *United States v. Alcoa (Rome)*, 377 U. S. 271 (1964).

15. *United States v. International Boxing Club of N. Y. Inc.*, 358 U. S. 242 (1959).

In relying upon *United States v. Continental Can*, 378 U. S. 441 (1964), as an example of the impropriety of treating competing products as separate markets, the district court appears to have misinterpreted that case. The court in *Continental Can* held that for antitrust purposes the "meaningful competition" between glass and metal containers implied that a relevant market could be constructed of those two product lines. The Supreme Court carefully elaborated, however, that "Glass and metal containers were recognized to be two separate lines of commerce." *Id.* at 456. Moreover, "that there is a broader market made up of glass metal and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic, or cans and glass together, for 'within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.'" *Id.* at 458.



> [T]he [legal] guidelines offer no precise formula for judgment, and they necessitate rather than avoid, careful consideration based on the entire record.[16]

As this Court recently indicated, a pronouncement as to market definition is not one of law, but of fact,, and as such, a party in a private action may allocate it to the jury.[17] Meticulous "color-matching" [18] of precedent to determine how similar a particular product is to others which have or have not constituted markets in other cases is thus not nearly so important as a detailed examination of the record developed in the trial court.[19]

2. *The Market as Presented at Trial*

According to the evidence here, culvert pipe is used primarily in large construction projects, such as housing developments and highways, to provide channels for draining surface water. Three types of culvert pipe are manufactured: steel, concrete, and aluminum. There was testimony from a number of witnesses that since all three materials have different physical properties, with rare exceptions specifications for construction projects call for

16. 378 U. S. a t449.

17. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1349 (3d Cir. 1975).

18. *Bell v. United States*, 349 U. S. 81, 83 (1955) (Frankfurter, J.).

19. It is for this reason that the defendants' reliance on *United States v. Amsted Industries, Inc.*, CCH 1974-2 Trade Case ¶ 75,-208 (N. D. Ill. 1974) and *United States v. Johns-Manville Corp.*, 231 F. Supp. 690 and 259 F. Supp. 440 (E. D. Pa. 1966) (Van Dusen, J.), which refused to find submarkets composed of particular varieties of pipes, is misplaced. The evidence submitted to the finders of fact in those situations clearly differed from the record in the case before us, which involves a wholly different set of litigants. We also note that *Amsted* was decided after a full trial rather than on a motion for a directed verdict.

only one type of culvert.[20] As a result, on most occasions —once the engineering specifications for the project have been fixed—the contractor who actually purchases culvert pipe may choose only among different manufacturers of the same material. From the contractor's point of view, there could reasonably be said to exist distinct markets for aluminum, for steel and for concrete pipes. Consequently, if he avoided exceeding the price necessary to induce engineers not to specify aluminum, a monopolist in aluminum culvert might well be able to raise prices without fearing encroachment on his sales from other products.

Nor would a jury have acted unreasonably in finding, on the basis of the record here, that the patterns of action on the part of engineers who specify the type of culvert to be used establish aluminum as a separate market. For there was testimony that price was not the crucial variable in the choice by engineers among the materials used to drain surface water. Roy Elam, a former city engineer who qualified as an expert witness, testified that in his experience "cost is checked out at the end of the design," and "budget numbers are not influenced much" by the cost differentials between concrete, aluminum and steel.[21] He also indicated that the choice

20. N. T. 36 (Joseph Bonjourno, president of Columbia); N. T. 1272-73 (Roy Elam, former county engineer); N. T. 1282 (Don Spoltore, contractor). Carlos Chaffin, of Reynolds Aluminum, however, testified that specifications generally called for aluminum and steel as alternatives.

Since we deal here with a directed verdict, of course, we must resolve conflicts in testimony in favor of the plaintiff. In view of this standard we are somewhat puzzled by the district court's assertion that "in many instances" both aluminum and steel pipe were specified. (36a).

21. N. T. 1202.



among the materials was made primarily on the basis of their physical properties, rather than price.[22]

Credible testimony was produced to show that there is considerable difference among the physical properties of concrete, aluminum and steel: Concrete is stronger than steel, which in turn is stronger than aluminum. Concrete culverts, being smooth, conduct water better than steel or aluminum culverts, which are made out of corrugated metal. But steel and aluminum are easier to work with.[23] Further, steel generally is stronger than aluminum. Because of this, and because it has been in the market longer, steel is more widely used than aluminum. The State of New Jersey and the Federal government on occasion specify steel, but forbid aluminum.[24] There was also testimony, however, that aluminum resists corrosion better than steel and is more durable, particularly in salt-water regions. As a result, Elam asserted, aluminum is used to the exclusion of steel "along the shore."[25] Aluminum is also lighter than steel, and thus is preferred in marshy areas, where access for heavy equipment would be difficult.[26]

22. *Id.* N. T. 1216. *See Smith Kline Corp. v. Eli Lilly & Co.*, type script at p. 14, No. 77-1232 (3d Cir. 1978) (Market definition must take into account the fact that physicians, who regulate use of drugs are not cost-conscious. Therefore, despite overlap in capabilities, drug with unique features constitutes separate market). There is also evidence that the New Jersey Highway Department takes the position that physical capabilities of culvert rather than cost should be the deciding factor. N. T. 1216.

23. N. T. 1159, 1185; 1212-1220 (Elam).

24. N. T. 676 (Bonjourno).

25. N. T. 1219. *See* N. T. 676 (Bonjourno: customer "would only accept aluminum" in salt water environment); N. T. 886 (Buchy, of KACSI: better acceptance around salt water environment); N. T. 1549 (Arvay, manufacturer: aluminum's longer life in salt-water environment makes is desirable).

26. N. T. 1220 (Elam). *See* N. T. 676, (Bonjourno).

In sum, Elam stated that, as to engineering properties, there was "no way you could say these three [types of culvert] are interchangeable," [27] and that the materials "were not in competition from an engineering standpoint." [28]

Thus, there is evidence from which the jury could reasonably have concluded, as did Mr. Elam, that aluminum is recognized by customers as a "specialty material used only in special applications." [29] Aluminum culvert could therefore have been found by the jury to constitute a separate submarket.[30]

27. N. T. 1158-59.

28. N. T. 1267-69. Chaffin, of Reynolds stated that the products were "not completely interchangeable," though they were "interchangeable." N. T. 2101. *Cf.* N. T. 1385 (Schamberg, salesman: "no competition because engineers feel very strongly about their products").

29. N. T. 1221, 1226. See N. T. 1549 (Arvay, aluminum manufacturer: "aluminum is a very specialized product").

30. Evidence on most other indicia of submarket existence was equivocal, but could reasonably be understood to support plaintiff's position.

No figures were presented on cross-elasticity of demand. On one hand Collins testified that "it is possible" that Bonjourno had said that he lost business as a result of lower concrete prices. N. T. 1653. And the statement that price levels of sheet aluminum and sheet steel were related (Chaffin N. T. 2114) could be taken to imply that consumers switched back and forth in response to price between the two varieties of culvert, allowing manufacturers to purchase whichever sheet was cheaper. On the other hand, Elam testified that despite the great increase in concrete and steel prices, he gave no consideration to substituting aluminum for concrete. N. T. 1212. And the rough studies introduced at trial showed little sensitivity of aluminum culvert prices to price changes of other culvert types.

It is true there was testimony that the same production facilities can be used to turn out both steel and aluminum culvert, and that the same companies often manufacture both. This, however, is not enough to preclude the existence of submarkets as a matter of law. *Compare Brown Shoe Co. v. United States*, 370 U. S. 294, 326 (1962) (mens, womens, childrens shoes are separate submarkets) with *id.*, 367 (Harlan, J. dissenting) (plants may be shifted between production of the three types of shoes).



The defendants point to testimony by producers of aluminum culvert pipe, including the plaintiff's president, which makes reference to "competition" between aluminum and steel manufacturers in attempting to have their respective products specified by engineers, as well as statements by KACSI and Reynolds employees that prices of aluminum culvert are set with reference to steel.[31]

Although such testimony is surely not irrelevant to the definition of a market, neither is it determinative in the context of this case. First, it is not the perceptions of manufacturers but those of consumers which are most salient in the determination of market boundaries.[32] More important, the existence of competition between two product lines does not alone preclude market power within each line, if each product has a cadre of customers in which it enjoys a decisive advantage. For example, in *United States v. Grinnell*,[33] the Supreme Court acknowledged competition between the defendants' "central station alarm" system and other protective devices. Indeed said the Court:

> We recognize that (as the district court found) [the defendants] do not have unfettered power to control the price of their services . . . due to the fringe competition of other alarm or watchman services.[34]

31. *E.g.* N. T. 192, 189, 616, 571-72 (Bonjourno); N. T. 2336, 2338-39 (Collins, KACSI); N. T. 1977 (Melrose, Reynolds employee). *But see* N. T. 564-66 (Bonjourno: did not compete often with steel).

32. *See* e.g. *Smith Kline Corp. v. Eli Lilly & Co.*, CCH Trade Cas. 1976-2 ¶ 61, 199 at p. 70,460 (E. D. Pa. 1976) (Higginbotham, J.) affirmed No. 77-1232 (3d Cir. 1978); *Beatrice Foods, Inc. v. FTC*, 540 F. 2d 203 (1st Cir. 1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F. 2d 547, 551 (1st Cir. 1974) *cert. denied* 421 U. S. 1004 (1975).

33. 384 U. S. 563 (1966).

34. *Id.* at 574.

Nonetheless, the Court held that the central station services constituted a separate market, since "some customers will . . . be unwilling to consider anything but central station protection." [35] From the evidence presented, it would not have been unreasonable for the jury here to have made a similar finding. Accordingly, we must reject the trial judge's conclusion that the evidence "establishes that aluminum culvert pipe is not a separate submarket from steel culvert pipe." [36] Inasmuch as there was sufficient evidence to go to the jury on this central question, we treat the market, at least for purposes of this appeal, as composed of aluminum culvert pipe.

D. MONOPOLIZATION

The directed verdict against the plaintiffs on the claims that the defendants monopolized, attempted to monopolize, and conspired to monopolize in violation of § 2 was based on the trial judge's prior conclusion that steel and aluminum, rather than aluminum culvert pipe alone, constituted the relevant market. Based on the small percentage of the steel and aluminum market which the defendants represented, the trial judge held that there was insufficient evidence to allow a jury to find monopolization, the probability of success necessary for attempted monopolization,[37] or the specific intent prerequisite to liability on a conspiracy to monopolize.

35. *Id.* Also instructive is *United States v. Alcoa* (Rome) 377 U. S. 271, 275 (1965), where the Supreme Court said:

> Admittedly there is competition between insulated aluminum conductor and its copper counterpart, as the district court found. Thus, in 1959, insulated copper conductor composed 22.8% of the gross additions to insulated overhead distribution lies. . . . Yet, we conclude that the degree of competitiveness does not preclude the division [of aluminum from copper] for purposes of § 7 into separate submarkets.

36. District court's opinion p. 6.

37. In *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1330, 1348 n. 17 (3d Cir. 1975), we declined to follow the Ninth Circuit's



Since we hold that a conclusion that aluminum culvert pipe constituted a relevant market was not unreasonable, the foundation of the directed verdicts on the § 2 counts collapses.

There was sufficient evidence from which the jury could have inferred that KACSI attempted to drive Columbia out of business. Holmes Collins, the manager of KACSI's highway division, was heard to say that if Columbia bought metal from Reynolds he, Collins, would locate an aluminum culvert plant in Columbia's "backyard." [38] This was relevant because transportation of culvert is a significant item of expense for the product in question, and a local manufacturer of culvert has an advantage over one whose plant is at a distance from the place of delivery.[39] In fact, Collins did so locate a plant, despite the fact that there was evidence that his original plans called for a Virginia situs.[40]

37. (Cont'd.)
rule that it is possible to find an "attempt to monopolize" a "part of commerce" in violation of § 2 without first determining the share of the relevant market controlled by the defendant. *Lessig v. Tidewater Oil Co.*, 327 F. 2d 459, 474-75 (9th Cir. 1964); *Greyhound Computer Corp. v. International Business Machines*, 559 F. 2d 488, 504 (9th Cir. 1977) (and cases cited therein). Instead, "at least in a case such as this," we utilized the criterion of *Swift & Co. v. United States*, 196 U. S. 375 (1905), which required sufficient market power to come dangerously close to success. *Coleman Motor Co. supra*, at 1348. *See Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 n. 28 (3d Cir. 1975); *but cf. United States v. E. I. DuPont & Co.*, 351 U. S. 377, 395 n. 23 (1956) (distinguishing market inquiry relevant to monopolization from that relevant to attempts or conspiracies to monopolize; commenting that where allegations of conspiracy and combination to monopolize are present, "the scope of the market was not in issue").

38. N. T. 858.

39. N. T. 1299, 1316 (Spoltore, contractor).

40. N. T. 2002, 2012. *Compare Schine Chain Theatres v. United States*, 334 U. S. 110, 119 (1948), where the Supreme Court upheld an inference of unlawful purpose violative of §§ 1 and 2

Moreover, the jury could have found that Collins extended credit to Kennedy, a competitor of Columbia, against the recommendations of the KACSI credit department,[41] thus showing that KACSI engaged in conduct against its business interest in order to damage the plaintiff.

More generally, there was evidence that KACC transferred sheet and coil to KACSI at accounting prices that were less than production cost and well below market price, enabling KACSI to sell pipe more cheaply than independent fabricators could manage.[42] While this may not be a classic predatory pricing endeavor, it effectively allowed KACSI to drive independents out of the market. Finally, the prices at which the Delaware KACSI plant sold culvert were lower than those KACSI charged at certain other plants, despite the fact that costs in Delaware were no lower—giving rise to a permissible inference that prices were depressed in an effort to harm Columbia.[43]

40. (Cont'd.)
from the finding that "Schine made threats to build theaters or to open closed ones in order to force sales of theatres in various towns or to prevent entry by an independent operator."

41. Exhibit P-75 (reproduced at 439a-441a) (memo from credit department finding "no basis for taking on" the credit exposure necessary to allow Kennedy to operate, noting necessity to provide "long term financial assistance"); Exhibit P-24 (reproduced at 438a) (unsigned Kaiser memo noting that for Kennedy to succeed, Kaiser must "maintain his profit margin" in the face of increased competition). *See* Exhibit P-5, (letter from Collins to Kennedy stating Collins' intention to "make Kennedy a success").

42. N. T. 2407-9, 2450-52, 2433-35, 2448-49 (C. E. Parker, KACC official, stating that "transfer prices" were lowered to below manufacturing cost, even excluding depreciation; KACSI profit was calculated using "transfer prices" as cost of materials).

43. N. T. 2336-2339. The testimony of Mr. Arvay, an independent aluminum culvert fabricator operating in the southern part of the United States, is also supportive of the plaintiff's theory. Arvay stated that after he "refused point blank" to purchase his raw materials exclusively from Kaiser, Kaiser began to compete in his area, where they had not previously been active. N. T. 1533. His



From the testimony and from KACSI's actions against its business interests, the jury could have inferred that KACSI intended specifically to punish Columbia for buying from Reynolds. And given the formerly close relations between KACSI and Columbia, the jury might well have inferred that KACSI knew of the drastic impact its maneuvers would have on Columbia's prospects for survival. Such activities, engaged in by an entity controlling more than 80% of the market, would be sufficient to allow the jury to find both the anticompetitive effects and intent requisite to liability for monopolization or attempted monopolization.

Accordingly we reverse the directed verdict as to defendants KACSI and KACC on the § 2 counts.[44]

### E. Conspiracy in Restraint of Trade

By its terms, § 1 of the Sherman Act proscribes "every combination . . . or conspiracy in restraint of trade." Liability under that section obviously requires a finding of a combination or conspiracy. In addition, under well-worn judicial interpretation, a finding of a § 1 violation entails a determination that such conspiracy or combination *unreasonably* restrains trade.[45] The trial judge here

43. (Cont'd.)
perception of the competition matched the "price squeeze" alleged by the plaintiff here: Kaiser marketed finished pipe a fraction of a cent above the price Arvay paid for raw materials. N. T. 1533-41.

44. The trial judge held in the alternative that insufficient evidence had been adduced to support a jury finding of conspiracy. Since we hold *infra* that such a conclusion is accurate as to Kennedy and Kennedy Culvert, we affirm the verdict as to those defendants.

45. The doctrinal template which continues to mold the rule of decision for modern cases is the articulation of Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U. S. 231, 238 (1918):

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The

supported his decision to grant a directed verdict on the § 1 charge both on the ground that there was insufficient evidence from which a jury could have found a combination or conspiracy, and on the basis that the evidence could not as a matter of law support a finding that whatever conspiracy allegedly existed unreasonably restrained trade.

The second rationale is untenable in light of our conclusion that the jury could have found that aluminum culvert is a relevant market. If the jury ascertained that KACSI, which controlled 80% of the aluminum culvert market, conspired to drive one of its few competitors (Columbia) out of business, such a conspiracy could have been found by the jury to violate § 1. Since, as we have

45. (Cont'd.)

> true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

*Quoted in, e.g. Continental T. V. Inc. v. GTE Sylvania, Inc.*, 433 U. S. 36, 49 n. 15 (1977); *Glauser Dodge Co. v. Chrysler Corp.*, (No. 76-2390, 77-1188, 3d Cir. 1977) slip op. at 18; *American Motor Inns Inc. v. Holiday Inns, Inc.*, 521 F. 2d 1230, 1246 (3d Cir. 1975).

As a further refinement, in certain classes of cases, "agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co. v. United States*, 356 U. S. 1, 5 (1958) *quoted GTE Sylvania supra* 433 U. S. at 50.



noted previously,[46] the presence of independent producers in an oligopolistic market serves to limit the market power of the dominant firms, the departure of an independent producer in such a situation adversely affects competition. Where such an elimination is consciously brought about by concerted action to which a dominant entity is a party, at least in the absence of a compelling business justification for such actions, an unreasonable restraint of trade may be found to exist.[47]

46. *Glauser Dodge Co. v. Chrysler Corp.*, (No. 76-2390, 77-1188, 3d Cir. 1977) slip op. at 20, *cert. denied* May 22, 1978; *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1347 (3d Cir. 1975); *see* N. T. 1848-1853 (Prof. Williamson, an economist, testifying as an expert witness, elaborated the adverse effects on competition resulting from driving independents out of business through use of a price squeeze).

47. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1347 (3d Cir. 1975); *American Motor Inns v. Holiday Inns*, 521 F. 2d 1230, 1248 (3d Cir. 1975); *Fount Wip v. Reddi Wip, Inc.* 568 F. 2d 1296 (9th Cir. 1978); *Taxi Weekly v. Metropolitan Taxicab Board of Trade*, 539 F. 2d 907 (2d Cir. 1976).

Since there is sufficient evidence here for a jury to find that KACSI controls 80% of the relevant market, we need not decide the question of whether a conspiracy to eliminate a competitor would be a violation of § 1 in the absence of such a market position on the part of one of the conspirators. We note, however, that we have previously stated: "A contract, regardless of actual effect, contravenes the Act if it was intended as part of a scheme to . . . drive a competitor out of the market." *American Motor Inns, Inc. v. Holiday Inns*, 521 F. 2d 1230, 1248 (3d Cir. 1975). *See Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1347 (3d Cir. 1975) ("a combination of distributors which through unfair practices eliminates a competitor and leaves it in such a condition that it lacks the ability to continue business . . . has an adverse effect on the market place"); *Oreck v. Whirlpool*, 563 F. 2d 54, 58 (2d Cir. 1977) (plaintiff required to show either anticompetitive effect on industry as a whole, or that restriction was designed to drive it out of business) (dictum); *Fount Wip, supra*, (holding that attempt to drive firm out of business violates § 1, even where market is not sufficiently defined to allow finding of § 2 violation).

The position is not without support in Supreme Court decisions. *E.g. United States v. General Motors*, 384 U. S. 127, 146 (1966) ("exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free market prin-

Thus the issue as to the § 1 violation is whether the trial judge's alternative ground for decision is viable: that there was inadequate evidence to allow the jury to find a conspiracy involving KACSI to put Columbia out of business.

As observed above, there was evidence which could have permitted a jury to infer that KACSI acted with an intent to drive its competitor, Columbia, out of business. The propriety of the directed verdict thus turns on whether, with regard to KACSI and any other defendant,

> . . . the circumstances are such as to warrant [the trier of fact] in finding that the [alleged] conspirators had a unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement.[48]

Consequently, we now turn to examine separately the two groupings which, according to Columbia, harbor such common unlawful purposes.

1. *The Alleged KACSI/KACC Conspiracy*

The first combination alleged to violate § 1 arises out of the joint activities of KACC and KACSI. KACSI is a wholly-owned subsidiary of KACC, sharing joint manage-

47. (Cont'd.)
ciples embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins"); *Poller v. Columbia Broadcasting Syst.*, 368 U. S. 464, 468-73 (1962) (attempt to drive independent station out of business by television network makes out § 1 violation even though network's position in market served by television station was limited); *see, e.g. Ramsey v. UMW*, 401 U. S. 302, 304-05 (1971) (alleged conspiracy to drive small coal operators out of business); *First National v. Cities Services*, 391 U. S. 253, 284-86 (1968) (alleged conspiracy to drive independent oil producer out of business).

48. *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3d Cir. 1975) *quoting American Motor Inns Inc. v. Holiday Inns Inc.*, 521 F. 2d 1230, 1234, *quoting American Tobacco Co. v. United States*, 781, 810 (1946).



ment on several levels of operation. Because of this, KACSI and KACC suggest that they are incapable of conspiring together. Though legally distinct for most purposes, defendants argue, the reality of the corporate structure of KACC and KACSI negatives the plurality of actors legally necessary to form an illegal conspiracy.

This argument is not well-founded in law, for the prerequisites of a conspiracy under § 1 are fulfilled by the presence of two or more legally distinct corporations. Indeed, we recently had occasion to reject a contention of legal inability to conspire with regard to subsidiaries which were "part of an integrated Chrysler enterprise engaged in the manufacturing and marketing of automobiles." The claim that such corporation could not form a § 1 conspiracy, we held, was foreclosed by a line of cases in this Court reaffirming the viability of the "intra-enterprise conspiracy" theory as applied to separately incorporated entities.[49]

49. *Glauser Dodge v. Chrysler Corp.*, No. 76-2390, 77-1188 (3d Cir. 1977) slip op. p. 16, *cert. denied* May 22, 1978. *See Cromar Co. v. Nuclear Materials Equip. Corp.*, 543 F. 2d 501, 511-12 (3d Cir. 1976); *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3d Cir. 1975); *Bravman v. Bassett Furniture Co.*, 552 F. 2d 90, 101 n. 32 (3d Cir. 1977).

The defendants rely on *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F. 2d 1093 (3d Cir. 1972), for the proposition that a parent and subsidiary which are "in reality" the same corporation, cannot conspire. However, in *Cromar*, n. 18, we characterized the language upon which the defendants now rely as dictum.

Next, the defendants point to *Sunkist Growers Inc. v. Winckler & Smith Citrus Products*, 370 U. S. 19 (1962). But that case also offers scant support for an attack on the intra-enterprise conspiracy doctrine. *Sunkist* held only that the policy behind the Capper-Volstead Act required that two affiliated subsidiaries of a fruit marketing organization be treated as exempt agricultural organizations. Indeed, in *Case Swayne Co. v. Sunkist Growers*, 389 U. S. 384 (1967) the Court held that successors to the subsidiaries exonerated in *Sunkist I* were not exempt when their activities included processing by middle-men.

Rather, the Supreme Court has made clear that the choice to adopt dual corporate form subjects businesses to the strictures of

Judge Cahn's holding that there was insufficient evidence to go to the jury on the existence of a KACC/KACSI conspiracy was grounded on a different rationale. The trial judge pursued the opposite approach from the defendants' argument of "functional identity;" while he commented that he harbored doubts as to the capacity of KACSI and KACC to conspire, Judge Cahn held that rather than being too closely aligned to constitute a conspiracy, KACSI and KACC were not closely enough related. He determined that there was inadequate evidence to allow a jury to find that the two entities shared the requisite unity of purpose. We disagree with this evaluation.

49. (Cont'd.)
the antitrust laws. *Perma-Life Mufflers v. International Parts Corp.*, 392 U. S. 134, 141-42 (1968); *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 598 (1951); *Schine Chain Theaters Inc. v. United States*, 334 U. S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). The attempt of the student author of Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard* 75 U. Mich. L. Rev. 717, to read the Supreme Court cases as applying only to distinct economic entities is unconvincing, particularly in view of its failure to deal with *Schine Chain*.

If limitations on the intra-enterprise corporate conspiracy doctrine are necessary, it seems to us that a more appropriate standard and one more consistent with the cases is that articulated by Professor Sullivan:

> "Concerted action" by two "legal persons" which is limited solely to the internal management of a single firm does not restrain competition; but "concerted action" by two "legal persons" which erects barriers to entry by another separate firm . . . can be a restraint of trade. . . . [But] at some point, a diminished level of business integration between two related corporations will warrant a conclusion that they are two firms even though there are some elements of common ownership and control.

*Sullivan, Law of Antitrust*, 328 (1977).

*See Report of Attorney General's National Committee to Study the Antitrust Laws* 34 (1955) (no violation occurs if the "conspiracy" restrains no trade other than that of the parent and its subsidiaries").



Some of the efforts which allegedly engineered Columbia's elimination were concededly undertaken by KACSI alone. However, the jury could have found that the combined efforts of KACC and KACSI were utilized (1) to impose the price squeeze and (2) to open the New Castle plant.

In finding that prices for sheet and pipe were arrived at by Holmes Collins, KACSI's division manager, independently of KACC, and thus that KACC was not implicated by the price squeeze, Judge Cahn relied on the testimony of Collins as evoked by the defendants on cross-examination. Were this a finding of fact, and a judgment of credibility, such reliance could not be reversed. However, the defendants' motion was one for directed verdict, and Collins' testimony had been contradicted.

Collins himself stated elsewhere in his testimony that he had no part in setting the "specification price" of coil.[50] This casts doubt on his later assertion that the responsibility for setting all prices was solely his. Moreover, in a memorandum to his subordinates, which was admitted into evidence, Collins noted that he "had been chastised for not getting our prices up high enough."[51] Since there was testimony that Collins, as manager of the Highway Products Division of KACSI, reported to the Sheet and Plate Division of KACC,[52] the jury could have inferred that the pricing policies of KACSI were not independent as Collins claimed at trial, but rather arrived at jointly with KACC. Likewise, another KACSI employee, David Thomas, stated that "someone higher up than Mr. Collins"

50. N. T. 2332. Depending on market conditions, KACSI sold metal at either a "specification price" or a lower "commodity price" to some users. The withdrawal of the lower "commodity price" to culvert manufacturers is alleged to have been a factor in Columbia's demise.

51. Exhibit P-950.

52. N. T. 2409.

was responsible for a crucial price increase.[53] Again, the jury could reasonably have concluded from such testimony that pricing responsibility was shared with KACC.

Finally, and quite significantly, the keystone of the alleged price squeeze was the price at which KACC transferred coil and sheet to KACSI. So long as the transfer occurred at a price below cost, the predatory effect could be obtained if KACSI kept a sufficient and constant profit margin. Since KACC set the transfer price at a low level, apparently against its business interests, the jury could reasonably have found participation by KACC in the price squeeze.[54]

In regard to the placement of the New Castle plant, it appears that KACC's aproval of Collins "Request for Investment" was a precondition to his constructing the plant. From this involvement, along with the pricing policy, the close relationship between the companies, and the incentive for both KACC and KACSI to keep control of the market, it would not have been unreasonable for

53. N. T. 1456-59.

54. Compare *Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434, 446 (3d Cir. 1977):

> The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express can be inferred, but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action. . . . We recently articulated those circumstances in *Venzie Corp. v. United States Mineral Products Co.*, 521 F. 2d 1309 [1314] (3d Cir. 1975):
>
> (1) a showing of acts by the defendants in contradiction of their own economic interests . . . and
>
> (2) satisfactory demonstration of a motivation to enter an agreement.

*See First Nat. Bank v. Cities Services*, 391 U. S. 153, 184-88 (1968) (intent may be inferred from concerted action where interests of victim and predators conflict, and concerted action would work to the benefit of predators).



the jury to infer a conspiracy between KACC and KACSI to drive Columbia out of business.

### 2. *Alleged Kennedy/KACSI Conspiracy*

In contrast to the broad-ranging activities of KACC and KACSI, Kennedy's role in the scenario of Columbia's demise was a limited one. Kennedy left Columbia and opened his own business in competition with his former employer.[55] On its face, such conduct seems pro-competitive, although perhaps demonstrating less than punctilious faithfulness to Columbia, for it created a new competitive entity. And Bonjourno, president of Columbia, testified that two months before Kennedy left, Bonjourno, in the course of a dispute over Kennedy's salary, told Kennedy that Kennedy could "look around" in Southern New Jer-

55. The plaintiff refers to three other types of evidence to support their claim of a Kennedy-Kaiser conspiracy. First, Columbia has adduced testimony which could be understood to indicate that (a) Kennedy used confidential information he had obtained as a Columbia employee in formulating his own bid in Camden County; and (b) Kennedy solicited one Villari as a customer for Kaiser while still employed by Columbia. While such actions, if established might constitute actionable torts and would probably breach a duty of loyalty, their effect on Columbia's economic viability was neither shown to be substantial nor long-lasting. And the fact that Kennedy breached a duty of loyalty on two occasions does little to prove that he shared in Kaiser's anti-competitive design.

Second, Columbia points to what it refers to as the "clandestine meetings" between Kennedy and KACSI regarding the establishment of Kennedy's business while Kennedy was in Columbia's service. In view of the fact that Kennedy had not agreed to a covenant not to compete with Columbia, such meetings establish only that Kennedy "conspired" with KACSI to start his own business—hardly an anti-competitive act—not that he shared KACSI's anti-competitive purpose.

Finally, Columbia notes the fact that KACSI and Kennedy Culvert representatives were heard to comment at a bid that they had "gotten their wires crossed." Even if the comment was not, as KACSI claims, a jest, such hearsay repetition of an isolated remark without more is too weak a foundation upon which to build a structure of antitrust liability.

sey to see whether he could improve his remuneration.[56] Moreover, Bonjourno reiterated that there were no contractual impediments to Kennedy's leaving Columbia for other employment.[57]

Certainly Kennedy's actions could not be characterized as being against his economic interest. In the four years he was employed by Columbia, Kennedy's sales of pipe rose to $300,000 per year, making Kennedy Columbia's best salesman.[58] Nonetheless, Kennedy's salary increased only from $200 to $325 per week.[59] Nor is there any testimony that Kennedy was attempting to destroy Columbia. A finding that Kennedy consciously shared KACSI's anti-competitive purposes would thus be mere conjecture.

Likewise, the relationship between Kennedy and KACSI was not such as to give rise to a reasonable inference that Kennedy was aware of KACSI's strategy and knowingly associated himself with it. While it is true, as plaintiff maintains, that certain testimony can be taken to imply that KACSI gave Kennedy favored treatment, the record is devoid of evidence that Kennedy was privy to KACSI's broader machinations. And a jury could not have reasonably found that Kennedy knew that the probable effect of KACSI's actions would be to eliminate Columbia. The record is barren of testimony that Kennedy was aware either of Columbia's production costs, or of the price at which it bought metal. Absent this information, Kennedy could not know that the competitive pressure his entrance into the market evoked would prove fatal to Columbia.[60]

56. N. T. 374-75.

57. N. T. 375-78.

58. N. T. 346.

59. *Id.* there is also testimony that Kennedy was subjected to increased financial pressures between 1968 and 1972 due to the birth of his seventh, eighth, ninth and tenth children. N. T. 343-44, 347-78.



Inasmuch as we agree with the district court that there was insufficient evidence from which the jury could find a "unity of purpose, design or understanding," between Kennedy and the other defendants, we sustain the directed verdict as to Kennedy.

E. Clayton Act

The final count of Columbia's complaint charges KACSI with a violation of § 3 of the Clayton Act, 15 U. S. C. § 14, which makes it unlawful for:

> . . . any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Columbia contends that KACSI imposed upon it an exclusive dealing arrangement which precluded it from purchasing aluminum sheet and coil from other manufacturers so long as it bought KACSI materials. Such arrangement, Columbia maintains, substantially lessened competition in the aluminum coil and sheet market. This was true, Columbia, alleges, because its purchases, which were foreclosed to other sellers, represented at least 8% of the

60. *Cf. Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962) (holding agent potentially liable where he knew of the "obvious purpose and necessary effect" to eliminate independent stations and "had a personal stake in the outcome").

aluminum coil and sheet market where KACSI held 50% of the total sales. Such foreclosure, Columbia contends, violates the Clayton Act.[61] The district court, however, entered a directed verdict on this question because of the failure of Columbia adequately to prove that aluminum coil and sheet used in culvert fabrication was a "line of commerce" within the meaning of the Clayton Act.

In determining the share of the market preempted as a result of an exclusive dealing arrangement imposed by a producer, a court must look to the alternative customers available to purchase the output of other producers. Here, no evidence was adduced to show whether the output of the facilities which produced the aluminum sheet and coil for the culvert industry could be or were used to manufacture material sold only to fabricators of aluminum culvert pipe. Since this is so, there was insufficient evidence to demonstrate whether aluminum sold to culvert manufacturers, or some much larger market constituted the relevant line of commerce. Thus, the jury would be left without adequate guidance in attempting to delineate the share of the market foreclosed by the alleged exclusive dealing arrangement, or its probable market impact.

Consequently, we do not disturb the directed verdict on the Clayton Act claim.

F. Conclusion

(1) There was sufficient evidence to allow a jury reasonably to conclude that a relevant market for Sherman Act purposes was composed of aluminum culvert.

(2) There was sufficient evidence to go to the jury on the charge that KACSI and KACC violated § 2 of the Sherman Act by monopolizing or attempting to monopolize the aluminum culvert market.

61. Columbia's calculation is that since there was testimony that KACSI sold 6 million tons of sheet and coil to culvert manufacturers, and that KACSI held at least 50% of the market, Columbia's purchases of one million tons represented at least 8% of the market.



(3) There was sufficient evidence to go to the jury on the charge that KACC and KACSI conspired in restraint of trade in violation of § 1 of the Sherman Act.

(4) There was insufficient evidence to allow the jury reasonably to conclude that Robert Kennedy and Kennedy Culvert conspired with KACSI either in violation of § 1 or § 2 of the Sherman Act.

(5) There was insufficient evidence to allow the jury reasonably to define the "line of commerce" restrained by any exclusive dealing arrangement, and, thus, there was insufficient evidence to go to the jury on the claimed violation of § 3 of the Clayton Act.

The judgment of the district court will therefore be affirmed as to the defendants Kennedy Culvert and Robert Kennedy. As to KACC and KACSI, the judgment will be affirmed insofar as it granted a directed verdict against the plaintiffs on the Clayton Act claims; the remainder of the judgment will be reversed and the case remanded for action consistent with this opinion.

## APPENDIX E.

**Opinion of the United States District Court Granting Motion for Directed Verdict Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure.**

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-122

COLUMBIA METAL CULVERT CO., INC.

*v.*

KAISER ALUMINUM AND CHEMICAL CORP., et al.

MEMORANDUM OPINION

CAHN, *J.* July 20, 1977

On May 2, 1977, at the close of plaintiff's case, defendants' motions for a directed verdict pursuant to Fed. R. Civ. P. 50(a) were granted in favor of all defendants on all counts. This Memorandum Opinion is being filed to state the court's reasons for granting the rule 50(a) motions.

The plaintiff alleged various violations of the Clayton and Sherman Acts by the defendants Kaiser Aluminum and Chemical Corp. ("KACC"), Kaiser Aluminum and Chemical Sales, Inc. ("KACSI"), Robert A. Kennedy ("Kennedy") and Kennedy Culvert and Supply Company ("Kennedy Culvert"). More specifically, it is averred that defendants violated §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and § 3 of the Clayton Act, 15 U. S. C. § 14. The plaintiff also avers a Robinson-Patman Act (15 U. S. C. § 13) violation. This action was brought pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15.



Columbia is a New Jersey Corporation that fabricates aluminum culvert drainage pipe.[1] Columbia began as Columbia Steel and Culvert which manufactured steel culvert pipe. In 1962 Columbia decided to fabricate culvert pipe from aluminum and ceased using steel as a material. Kaiser[2] became Columbia's principal material supplier and Columbia relied on Kaiser's expertise in aluminum.

KACSI is a wholly-owned subsidiary of KACC. The Kaiser corporations fabricate finished culvert pipe in addition to selling aluminum sheets and coils. The two Kaiser corporations have the same directors. The corporate officers of KACSI are, with two exceptions, also officers of KACC. KACC and KACSI are considered as one company both by the industry and by their own employees. KACSI was a major supplier of Columbia for most of the time that Columbia was in the aluminum culvert business although Columbia purchased substantial amounts of aluminum from Reynolds Aluminum Company. Kennedy is a former employee of Columbia who left Columbia's employ and formed a competing corporation, Kennedy Culvert.

1. A dictionary definition of culvert is a drain or channel crossing under a road, sidewalk, etc.

2. In this opinion "Kaiser" will refer to both KACC and KACSI.

STANDARDS FOR DIRECTING A VERDICT PURSUANT TO FED. R. CIV. P. 50(a)

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. *Krivo Industrial Sup. Co. v. National Distill. & Chem. Corp.*, 483 F. 2d 1098 (5th Cir. 1973); *Hohmann v. Packard Instrument Company, Inc.*, 471 F. 2d 815 (7th Cir. 1973); 5A MOORE'S FEDERAL PRACTICE ¶ 50.02 at 2324 (2d ed. 1975). In the *Krivo* case, the Fifth Circuit stated (p. 1102) that in order for an appellate court to overrule a verdict directed at the close of the plaintiff's case, "the party against whom a verdict was directed must demonstrate the existence of a conflict on substantial evidence. He must show that, at trial, he introduced sufficient evidence so that reasonable men, weighing all the evidence, might reach different conclusions." *Also see Vogue v. Retail Credit Company*, 453 F. 2d 336 (4th Cir. 1972), *cert. denied*, 409 U. S. 1109 (1973). A further amplification of this standard is stated in 5A MOORE'S FEDERAL PRACTICE ¶ 50.02[1], at 2320 (2d ed. 1975):

> As already indicated, the question of the total absence of proof quickly merges into the question whether the proof adduced is so insignificant as to be treated as the equivalent of the absence of proof. Although the language of the opinions concerning directed verdicts is extremely varied, it is now clear that a verdict will normally be directed where both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion.

It is clear from these cases that in order to survive a rule 50(a) motion, the plaintiff must present more than a scintilla of evidence.



Furthermore, "in a case such as this where the plaintiff relies on circumstantial evidence to support a finding of the conspiracy charge, the Court must consider all the evidence as a whole, without compartmentalizing or isolating the facts adduced as to one or another of the defendants or as to a particular aspect of the case." *Harlem River Cons. Co-op. v. Associated Groc.*, 408 F. Supp. 1251, 1260 (S. D. N. Y. 1976). These standards will be applied to the plaintiff's various legal theories. One of the major obstacles that the plaintiff failed to overcome was to prove the relevant product market. Since an analysis of the relevant product market is pertinent to all the antitrust counts, that issue will be considered first.

RELEVANT PRODUCT MARKET

The plaintiff concedes it was crucial to its case to prove that the relevant product market was limited to aluminum culvert pipe and did not include culvert pipe fabricated from steel and concrete. As will appear below, unless the product market is narrowly defined, the plaintiff cannot prove certain essential elements of its causes of action. It is settled law that the question of relevant product market is one for the jury. *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1349 (3d Cir. 1975). However, the evidence plaintiff presented tended to establish a relevant product market for metal culvert pipe [3] in general rather than a market restricted to culvert pipe fabricated from one commodity.

In *Science Products Co., Inc. v. Chevron Chem. Co., Inc.*, 384 F. Supp. 793, 795 (N. D. Ill. 1974), the court stated:

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3. In all probability concrete culvert pipe is in the same relevant product market as metal culvert pipe. The inclusion of concrete culvert pipe in the relevant product market would tend to decrease further the defendants' relatively small share of the market.

> In defining the relevant product market, the Supreme Court has directed that economic and commercial realities must be examined. (Citations omitted.) If competition cuts across product or industry lines, the product market must be drawn broadly to include competition as it exists. (Citations omitted.) Moreover, 'the court must be wary of falling into the temptation of tailoring the market to the dimensions of the defendant's business.'

Unless the broad approach taken in *Science Products Co., Inc.*, is applied, a separate market will be established for each separate product. A narrow approach to the definition of relevant product market would nullify the intended effect of the antitrust laws as it would view this country's competitive marketplace in an unrealistic manner. For example, a restrictive definition of the market would permit the merger of firms whose products, while made from different material, actually competed with each other.

Plaintiff's evidence demonstrates that aluminum culvert pipe and steel culvert pipe were in direct competition at two levels. On one level, the culvert pipe fabricators attempted to convince governmental entities to specify their particular product for use and exclude other products. In many instances the result of this competition was that both aluminum and steel culvert pipe were specified. A second level of competition existed in the actual sale of pipe. The testimony introduced by the plaintiff showed that as a result of this, a decision on the part of culvert buyers as to whether they would purchase steel or aluminum was governed by price and that Kaiser and other aluminum culvert pipe fabricators were required to structure their prices to be competitive with culvert pipe made from steel.



It is true that these two metals have different properties and characteristics but that fact alone is insufficient to place aluminum culvert in a separate market. *United States v. Johns-Manville Corporation*, 259 F. Supp. 440 (E. D. Pa. 1966).[4] In *United States v. du Pont & Co.*, 351 U. S. 377, 394 (1956), the court said:

> But where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be part of the market. . . . In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.

The *du Pont* case further states (p. 400) that an element for consideration in determining whether there is a cross-elasticity of demand is the responsiveness of the sale of one product to price changes of the other.

The case of *Brown Shoe Co. v. United States*, 370 U. S. 294, 325 (1962), sets out seven criteria that are to be considered the outer boundaries of a product market:

> The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, dis-

4. In this case, Judge Van Dusen held that asbestos cement pipe was not a relevant market by itself but was in a product market that included plastic, tile and concrete pipe.

> tinct customers, distinct prices, sensitivity to price changes and specialized vendors.

*Id.* at page 325. By applying the *Brown Shoe Co.* criteria to aluminum culvert it is readily apparent that aluminum culvert pipe is not a proper submarket. The testimony introduced by the plaintiff at trial showed: that the production facilities for aluminum culvert pipe were not unique because the same facilities had the capability to fabricate steel culvert pipe, that customers for the two products were the same, that Columbia Metal and perhaps one other fabricator in South Carolina were the only fabricators who specialized in aluminum culvert pipe. Most others produced both aluminum and steel culvert pipe. In addition, aluminum and steel culvert pipe are not recognized by the public as separate and distinct lines. The same vendors usually sell both products, and the characteristics of the products are sufficiently similar that in most instances they are interchangeable. Finally, as was mentioned above, plaintiff's witnesses testified that Kaiser, in order to maintain its share of the market, had to price its aluminum product close to the price of the steel product. An application of the *Brown Shoe Co.* criteria establishes that aluminum culvert pipe is not a separate submarket from steel culvert pipe.

An analysis of *United States v. Continental Can Co.*, 378 U. S. 441 (1964), is also important because the competitive situation present in *Continental Can* between cans and bottles is similar to the one present in this case between aluminum and steel culvert pipe. In the *Continental Can* case (p. 453-454) the Supreme Court described the competition between cans and bottles as:

> In our view there is and has been a rather general confrontation between metal and glass containers and



> competition between them for the same end uses which is insistent, continuous, effective and quantity-wise very substantial. Metal has replaced glass and glass has replaced metal as the leading container for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other; and each is attempting to preempt for itself every use for which its product is physically suitable, even though some such uses have traditionally been regarded as the exclusive domain of the competing industry . . . Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within § 7's competition-preserving proscriptions.

In *Continental Can* the Supreme Court held that despite the distinctive differences between glass bottles and metal cans, they are in the same product market because of interchangeability of use and cross-elasticity of demand as exhibited by the direct confrontation and competition between the products. *Also see George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F. 2d 547 (1st Cir. 1974). The plaintiff's evidence proved that the same type of competition exists in the culvert pipe industry. As Mr. Bonjorno, plaintiff's president, testified, Columbia was in direct competition with steel culvert pipe fabricators. In fact, Columbia predicated its existence on its ability to sell aluminum culvert pipe where steel or concrete pipe had been specified in the past. As long as Columbia was in the aluminum culvert pipe business, its goal was to gain

acceptance for aluminum culvert pipe and to take business away from the steel culvert pipe fabricators. Mr. Bonjorno also testified that he complained to Kaiser about supplying aluminum to a competitor of Columbia who was attempting to promote steel to the detriment of aluminum.

The fact that aluminum and steel have different physical characteristics that may make one or the other superior for certain culvert pipe applications is insufficient evidence of a separate submarket in light of the overwhelming evidence of direct competition and the cross-elasticity of demand between the two products. Therefore, it was appropriate to take the relevant product market issue from the jury.

Having decided to define the relevant product market to include culvert pipe fabricated from aluminum and steel, I will now discuss in detail my reasons for directing a verdict on each count of the plaintiff's complaint.

### Sherman Act § 1, KACC-KACSI

#### a. *Capacity to Conspire.*

In order to recover under § 1 of the Sherman Act a plaintiff must establish (1) that there was a contract, combination or conspiracy and (2) that such contract, combination or conspiracy was in restraint of trade. *Beckman v. Walter Kidde & Company*, 316 F. Supp. 1321 (E. D. N. Y. 1970). A threshold issue is whether the parties who allegedly participated in the contract, combination or conspiracy had the capacity to conspire with each other. There is no doubt in this circuit after *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F. 2d 501 (3d Cir. 1976), that a wholly-owned subsidiary has the capacity to conspire with its parent to commit a Sherman Act violation despite the fact they do not hold themselves out in competition with each other. *See Coleman Motor Co. v. Chrysler Corp., supra; Higbie v. Kopy-Kat, Inc.*, 391 F. Supp. 808 (E. D. Pa. 1975); *Quigley v. Exxon Company U. S. A.*, 376 F. Supp. 342 (M. D. Pa. 1974).



Strict adherence to the position taken in the *Cromar* case would lead to an unusual result in this case. Since KACC and KACSI have the same directors and essentially the same officers, the conspiracy would be limited to one entity and thus be a contradiction by definition. The singular identity of the two corporations distinguishes this case from the fact situation presented in *Cromar*. Nevertheless, the directed verdict was not granted on the ground KACC and KACSI lacked capacity to conspire with each other. For the purposes of this case I assume that the two Kaiser corporations have the capacity to conspire with each other. However, I note the factors that tend to distinguish this case from *Cromar* on the capacity-to-conspire issue.

#### b. *Contract, combination and conspiracy.*

Although it is assumed that KACC and KACSI have the capacity to conspire with each other, the plaintiff has failed to demonstrate the requisite evidence to survive a rule 50(a) motion on the issue of whether a conspiracy did exist between these two corporations. In determining whether a conspiracy exists, circumstantial evidence may be used and the various acts complained of must be viewed together to determine whether the defendants entered into a conspiracy. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 418 F. Supp. 1009 (D. N. J. 1976); 1 Von Kalanowski Antitrust Laws and Trade Regulation § 6.01[3] (1977). The plaintiff's sole allegation of conspiracy between KACC and KACSI "is evidenced by the bizarre pricing of aluminum coil and sheet (produced by Kaiser Aluminum) in relation to the price of pipe (produced by

KACSI) which has directly resulted in the elimination of Columbia as a competitor." Plaintiff's Trial Brief, p. 15. The evidence at trial introduced by the plaintiff established that KACSI's Highway Products Division was responsible for setting prices of the products that were sold to Columbia. Mr. Holmes T. Collins, the manager of the Highway Products Division of KACSI, testified that during the period between January, 1966; and January, 1977, he set the prices for the Highway Products Division and consulted no one other than his own staff, who were all KACSI employees. No facts were introduced to support a contention of conscious parallelism other than the prices themselves. There was no other evidence of a combination between KACC and KACSI. Therefore, the plaintiff has presented insufficient evidence to present a factual issue to the jury on the question of whether a conspiracy existed between these entities.[4a]

c. *Restraint of Trade.*

Even assuming that the plaintiff had presented sufficient evidence to submit to the jury the question of a KACC-KACSI conspiracy, the defendants were entitled to a directed verdict on the Sherman § 1 claim, because the plaintiff failed to introduce sufficient evidence to present a jury question on the issue of restraint of trade. In order to demonstrate a restraint of trade "[i]t is essential, . . . that plaintiff show that the challenged practices

4a. Conceptually the plaintiff's failure to prove a contract, combination or conspiracy is determinative of its Sherman Act § 1 claim. If the plaintiff had shown a per se violation of the Sherman Act existed, all it would have had to prove was the requisite conspiracy. The plaintiff failed to meet this burden. In a situation where no pre se violation exists, the plaintiff must prove a restraint of trade resulted in addition to proof of conspiracy. This court will proceed to discuss this restraint of trade requirement in the next section.



adversely affected 'competition in the marketplace.' (Citations omitted.) Regardless of the extent of injury suffered by [the plaintiff] there can be no recovery unless the defendants' conduct produced a substantially adverse effect on competition in the relevant market." *Martin B. Glauser Dodge Co. v. Chrysler Corp., supra,* at page 1017. *Accord, Carlo C. Gelardi Corp. v. Miller Brew. Co.,* 421 F. Supp. 237 (D. N. J. 1976). There is no evidence at all in the record that aluminum and steel culvert pipe were any less available at competitive prices in the relevant geographic area as the result of actions of the defendant.

Columbia's position in the market is so limited that any conspiracy directed at it, even if successful, would not have much effect on competition in the marketplace. There was no evidence introduced at trial that after Columbia had gone out of business the price of culvert pipe in the geographic market increased in an unusual manner. One factor indicative of an adverse effect on competition would have been an unusual price increase. There was "no evidence whatever of harm to general competition in the market. There is nothing to indicate that the number of competitors has been affected, or that the market has been fixed or manipulated, so that competition is lessened." *Carlo C. Gelardi Corp.,* at page 244.

Another undisputed fact that shows that the defendants KACC and KACSI had not adversely affected competition in the market was their limited position in the market for culvert drainage pipes of all types. *Cf. Holleb & Co. v. Produce Terminal Cold Storage Co.,* 532 F. 2d 29 (7th Cir. 1976).

Since the plaintiff has failed to present sufficient evidence on the question of whether the alleged KACC-KACSI conspiracy adversely affected competition in the marketplace, there is no jury question present on that issue.

SHERMAN ACT § 1, KAISER—KENNEDY

The plaintiff's Sherman § 1 complaint is based upon the *Pick-Barth* per se rule.[5] The plaintiff alleges that the Kaiser and Kennedy defendants conspired to commit business torts for the purpose of injuring or destroying the plaintiff as a business competitor. This court is of the opinion that the application of a per se *Pick-Barth* rule is no longer valid but is survived by an approach which utilizes the rule of reason. *Craig v. Sun Oil Company of Pennsylvania*, 515 F. 2d 221 (10th Cir. 1975), *cert. denied*, — U. S. — , 50 L. Ed 2d 92 (1976); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., supra; Associated Radio Service Co. v. Page Airways, Inc.*, 414 F. Supp. 1088 (N. D. Tex. 1975); *Southland Reship, Inc. v. Flegel*, 401 F. Supp. 339 (N. D. Ga. 1975); *Tower Tire & Auto Ctr., Inc. v. Atlantic Richfield Co.*, 392 F. Supp. 1098 (S. D. Tex. 1975); Janssen, *Antitrust Considerations in Proceedings Against Former Employees Who Compete Against Their Former Employer*, 31 Bus. Law. 2063 (1976). Contrary to the defendant's position, a conspiracy to destroy competition by utilizing unfair competitive practices may very well be an antitrust violation and should be analyzed on a case-by-case basis.

The Janssen article mentioned above postulates the minimum that a plaintiff must prove to establish an antitrust cause of action under these circumstances:

> 1) That there exists an agreement, combination or conspiracy; 2) that the defendant utilized unfair methods of competition as a part of the agreement, combination or conspiracy; 3) that the intent of the parties to the agreement, combination or conspiracy is to eliminate plaintiff completely as a competitor; 4) that there exists such a significant market power in the defendants that there is no meaningful possibility of reasonableness under the circumstances, . . . and 5) in the absence of an appropriate per se approach, that the acts of the defendants were an unreasonable restraint of trade and had a substantial adverse public effect on the market . . .

31 Bus. Law 2063, 2067 (1976). In the case before this court the plaintiff has failed to meet its burden of presenting more than a scintilla of evidence on the factors mentioned above. A rule 50(a) motion is proper on this count, because even if the plaintiff produced sufficient evidence to present a jury question on the first three standards mentioned above, the plaintiff presented insufficient evidence on the issues of whether the acts of the defendants had a substantial adverse public effect on the market and were an unreasonable restraint of trade.

In this case, whether the percentage of the market affected is substantial enough to make the restraint unreasonable can be resolved by utilizing a percentage test. 1 VON KALANOWSKI ANTITRUST LAWS AND TRADE REGULATION § 6.02[4] (1977). Von Kalanowski further stated at page 6-140:

> The most direct test of whether a relevant market has been unreasonably affected looks solely to the percentage of the market which has been affected. In such cases, the courts, without further analysis, hold that because a particularly high or low percentile of the relevant market is affected, the restraint is either unreasonable or reasonable.

5. The case of Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F. 2d 96 (1st Cir.), *cert. denied*, 286 U. S. 552 (1932), established the broad proposition that unfair competitive practices accompanied by an intent to hurt a competitor constituted per se violations of the antitrust laws.

The courts, however, have not set up specific guidelines with respect to percentages. They usually state that the reasonableness of the percentile figure varies with the facts of each case. Despite those generalized statements, the following guidelines can be culled from the cases:

(1) A restraint which affects 80 percent or more of a relevant market will most probably be held unreasonable without further inquiry.

(2) A restraint which affects less than 50 percent of the relevant market will probably be held reasonable without further inquiry.

(3) A restraint which affects between 50 percent and 80 percent of the market requires further study under the market structure test to determine reasonableness.

The plaintiff has introduced no evidence which shows the effect of the defendants' alleged actions upon the relevant market. Therefore, this court must look to the percentage of the relevant market held by the plaintiff and the defendants in order to determine market impact. Once it is determined that the relevant market in this case includes both aluminum and steel culvert pipe, as this court has held above, then it is undisputed that the plaintiff and the defendants have a *de minimis* share of the relevant market. The amount of business done in the relevant market by all the parties to this case is significantly less than fifty percent of the total market. Therefore, this court must conclude that the alleged acts of the defendants, even if found by the jury to have occurred, did not result in an unreasonable restraint of trade, nor did they have a substantial adverse effect on the market.



It also should be pointed out that the evidence introduced by the plaintiff on the issue of conspiracy and of unfair methods of competition was tenuous. The unfair competitive acts shown in this case are much less severe than the business torts that were proved in other cases of this type where an antitrust cause of action was found to exist. *See C. Albert Sauter Co., Inc. v. Richard S. Sauter Co., Inc.*, 368 F. Supp. 501 (E. D. Pa. 1973). Mr. Kennedy was employed under a contract terminable at will. This employment contract contained no covenant not to compete. Furthermore, there was no evidence that Mr. Kennedy was privy to any trade secrets, nor are there any allegations that trade secrets were stolen. The absence of severe anticompetitive acts negates the plaintiff's allegation that the defendants' intent was to put the plaintiff out of business. Rather, the plaintiff's evidence showed the defendants intended to introduce a new competitive entity into the marketplace.

One of the requisite elements the plaintiff must establish is a clear intent on the part of the defendants to destroy the plaintiff as a competitive entity. *Tower Tire & Auto Ctr., Inc. v. Atlantic Richfield Co., supra.* The cases that have allowed a revised *Pick-Barth* cause of action have placed a heavy burden on the plaintiff regarding proof of the defendants' intent. Such an approach is necessary to avoid federalizing unfair competition law.

> The *Pick-Barth* rule must henceforth be applied with great circumspection. It will not suffice for plaintiff Tower Tire to show that the defendants agreed merely to harm plaintiff's business. Nor will it suffice for plaintiff to show that the alleged conspiracy was 'calculated to cause a substantial decline in the ability of [the] existing competitor to compete'

> as plaintiff has urged. To succeed in its alleged cause of action, plaintiff must obtain a fact finding that the intent of the defendants was effectively to eliminate plaintiff from the relevant market.

*Tower Tire,* at 1107. It is clear that there was insufficient evidence presented on this point to present a substantial question of fact for the jury to decide. Therefore, even if the plaintiff has presented sufficient evidence of the existence of the conspiracy between the defendants to commit business torts (which is doubtful), the plaintiff has fallen short of presenting sufficient evidence on the issue of intent to go to the jury on a revised *Pick-Barth* theory. Nor was there any evidence of market impact from the alleged Kaiser-Kennedy conspiracy.

The plaintiff also seems to claim a Kennedy-Kaiser conspiracy to divide geographic markets and not to compete against each other. The only evidence introduced by plaintiff to support this contention was a statement attributed to a Kennedy employee overheard at a public bid opening. The gist of the statement is that Holmes Collins of KACSI would be displeased because "we got our wires crossed." This statement is subject to various interpretations. Despite the statements at the bid opening, to which the plaintiff points as proof of the Kaiser-Kennedy division of markets, not only did Kennedy bid against Kaiser, but outbid Kaiser and was awarded a portion of the contract. Furthermore, plaintiff's evidence established an industry practice whereby fabricators (such as KACSI and Columbia) did not bid against their distributors. Kennedy Culvert, unlike Columbia, did not fabricate aluminum pipe. Kennedy Culvert bought finished pipe fabricated by KACSI for further distribution.



SHERMAN ACT § 2

Section 2 of the Sherman Act proscribes actual monopolization, attempted monopolization and a combination or conspiracy to monopolize. These are three distinct offenses which will be discussed separately below.

a. *Monopolization.*

In order to prove the offense of actual monopolization the plaintiff must prove two elements:

> (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

*United States v. Grinnell Corp.,* 384 U. S. 563, 570-71 (1966). *See Sulmeyer v. Coca Cola Company,* 515 F. 2d 835 (5th Cir.), *cert. denied,* 424 U. S. 934 (1976); *Joe Westbrook, Inc. v. Chrysler Corp.,* 419 F. Supp, 824 (N. D. Ga. 1976); 1 VON KALANOWSKI ANTITRUST LAWS AND TRADE REGULATION § 8.01 (1977). Section 2 of the Sherman Act does not distinguish between monopolizing by one person and monopolizing by the joint or concerted action of two or more persons for proving the offense of actual monopolization. In this case, under the facts presented by the plaintiff, there is no circumstance under which a reasonable jury could have concluded that the defendants have monopoly power in the relevant market of steel and aluminum culvert pipe. The percent of the relevant market does not always, by itself, establish the existence or nonexistence of monopoly power. However, in this case the defendants' share of the market is so low as to be determinative. In the case of *United States v. du*

*Pont & Co., supra,* the Supreme Court held that du Pont's control of eighteen percent of the relevant market was insufficient to constitute a monopoly. *Also see, Sulmeyer v. Coca Cola Company, supra* (22%); *Oak Distributing Co. v. Miller Brewing Company,* 370 F. Supp. 889 (E. D. Mich. 1973) (3%). In this case the defendants' share of the market is less than the eighteen percent that the Supreme Court found insufficient in the *du Pont* case.

Plaintiff's case contained further evidence of the defendants' lack of monopoly power. There are a large number of other firms in the industry and most of those firms are of equal or greater size and strength than the defendants. Among the firms that compete with the defendants in the relevant marketplace are Bethlehem Steel Company and United States Steel Company or their subsidiaries. Because the plaintiff has failed to establish the existence of monopoly power in the defendants, one of the requisite criteria needed to prove a monopolization claim is lacking. Therefore, plaintiff cannot prevail on its theory of actual monopolization.

b. *Attempted Monopolization.*

> An essential element of a section two attempt to monopolize violation is that the actor have a specific intent to monopolize the relevant market. (Citations omitted.) Another essential element of the offense is that the actor have sufficient market power to come dangerously close to success.

*Coleman Motor Co. v. Chrysler Corp., supra,* at page 1348. *See George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., supra; Keco Industries, Inc. v. Borg-Warner Corporation,* 334 F. Supp. 1240 (M. D. Pa. 1971). These courts have held that in order to prove an attempt to monopolize



under § 2 of the Sherman Act, it is necessary to prove a dangerous probability of success in monopolization. *Also see* 27 A. L. R. Fed. 762 (1976).

In determining dangerous probability of success, an important criterion to consider is the defendants' share of the relevant market. There can be no dangerous probability of successfully monopolizing a market where as here the defendants have a *de minimis* share of the market. *Zenith Vinyl Fabrics Corp. v. Ford Motor Company,* 357 F. Supp. 133 (E. D. Mich. 1973). In the *Zenith Vinyl Fabrics* case the defendants had one percent of the market. In the case of *Hiland Dairy, Inc. v. Kroger Company,* 402 F. 2d 968, 974 (8th Cir. 1968), the court held that the potential foreclosure of twenty percent of the milk products market did not show a dangerous probability of success in a Sherman § 2 action.

In the case before this court, the defendants have less than a three percent market position in a market made up of aluminum, steel and concrete culvert pipe and a slightly higher percentage of a market consisting only of aluminum and steel pipe. The defendants' minimal [6] position in the relevant market makes it analogous to the two cases mentioned above. *Also see, Yoder Bros., Inc. v. California-Florida Plant Corp.,* 537 F. 2d 1347 (5th Cir. 1976) (20% of the relevant market is insufficient); *White Bag Co. v. International Paper Co.,* 1974-2 Trade Cas. ¶ 75,188 (4th Cir. 1974) (9% of the relevant market is insufficient); *C. A. R. Leasing, Inc. v. First Lease, Inc.,* 394 F. Supp. 306 (N. D. Ill. 1975) (leasing company that had 2% of the leasing business in the Chicago area and whose presi-

6. Plaintiff's attempted monopolization claim is predicated on a relevant product market consisting only of aluminum culvert pipe. Plaintiff never presented any evidence of market percentage related to a steel and aluminum market or to a steel, aluminum and concrete market of culvert pipe.

dent expected to obtain no more than 10% of that business did not possess the requisite monopoly potential).

The plaintiff failed to present sufficient evidence to establish a jury question on the issue of whether there was a dangerous probability of success. As a result of this, the defendants' rule 50(a) motion must be granted on the attempt-to-monopolize count.

c. *Conspiracy to Monopolize.*

The elements necessary to establish a conspiracy to monopolize are:

> (1) *Existence of a combination or conspiracy.* Concerted action is not a necessary element of an attempt to monopolize.
>
> (2) *Overt acts* in furtherance of the combination or conspiracy. The element of dangerous probability of the achievement of monopoly power, essential in attempt cases, is absent in cases of combination or conspiracy to monopolize.
>
> (3) *Substantial amount of commerce* affected. The existence of a relevant product and geographic market need not, however, be shown.
>
> (4) *Specific intent* to monopolize. The intent has been readily inferred by the courts from the existence of the combination or conspiracy.

2 VON KALANOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 9.02[1][a] (1977). The rule 50(a) dismissal is proper on this count because the plaintiff has failed to meet the burden of proof on the element of specific intent to monopolize.

The relevant market is an important consideration in determining whether a conspiracy to monopolize exists.



It is important in determining whether the requisite specific intent to monopolize is present. The requisite intent required is the intent to eliminate competition in the relevant market, in this case aluminum and steel culvert pipe.

The hypothetical situation presented by the court in the *Joe Westbrook* case, *supra,* at page 845, further illustrates this point:

> Defendants cannot be held liable under the Sherman Act for intending to do something which is perfectly lawful. For example, if X and Y conspire to exclude competitors from the market for ABC goods, ABC goods constituting a relevant product market, then the fact that X and Y do not have the requisite monopoly power is not a defense inasmuch as what they conspire and intend to do is unlawful. However, if X and Y conspire to exclude competitors from the market for ABC goods, and X and Y contend that ABC goods do not constitute a relevant market and in fact they do not constitute a relevant product market, then X and Y have not intended to monopolize in violation of Section 2 inasmuch as what they conspire and intend to do is not unlawful.

In the case before this court the plaintiff has, at the most, presented evidence that the defendants have a specific intent to monopolize the aluminum culvert market, which as has been shown, does not constitute a relevant product market. The plaintiff has failed to produce evidence of a specific intent on the part of the defendants to exclude competitors from the relevant product market, which is requisite to prove a conspiracy to monopolize in violation of § 2 of the Sherman Act. In addition, the plaintiff has introduced insufficient evidence on the question of whether a conspiracy existed at all.

CLAYTON ACT § 3

It is clear that all parties to this suit regarded the Clayton § 3 claim as a minor facet of this law suit and an afterthought.[7] This count must be rejected because the plaintiff failed to demonstrate a *prima facie* case. Very little of the plaintiff's evidence was specifically directed to this count. Columbia failed to identify the relevant product market for purposes of its § 3 claim. Identification of this product market is essential to proving a Clayton § 3 claim and in this instance such market is probably different from the relevant product market in the Sherman Act claims.

Furthermore, the plaintiff has not introduced any evidence of the lessening of competition. For these reasons, a rule 50(a) motion is proper on the Clayton § 3 count.

ROBINSON-PATMAN ACT

All parties agree that the plaintiff has not actively pursued its Robinson-Patman Act (15 U. S. C. § 13) claim and has made no demand for damages on this theory. Therefore, the merits of this claim require no independent discussion and analysis.

Edward N. Cahn
Edward N. Cahn, *J.*

7. As a result of the applicable four-year statute of limitations, the plaintiff's claims are limited to sales that took place in part of 1970. 15 U. S. C. § 15.



## APPENDIX F.

**Judgment of the United States District Court for the Eastern District of Pennsylvania.**

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-122

COLUMBIA METAL CULVERT CO., INC.

*v.*

KAISER INDUSTRIES CORP. et al.

CIVIL JUDGMENT

Before CAHN, *J.*

AND NOW, this 2nd day of May 1977, in accordance with a directed verdict.

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendants Kaiser Industries Corp. ET AL and against the plaintiff, Columbia Metal Culvert Co., Inc.

By THE COURT:

ATTEST:
PAUL E. HENDERSON
*Deputy Clerk*

Civ 1 8/75